No. 88-1

In the Supreme Court of the United States

October Term, 1988

CONSOLIDATED RAIL CORPORATION,
Petitioner

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, et al.,
Respondents

On Writ of Certiorari To The United States Court of Appeals for the Third Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 29, 1988
CERTIORARI GRANTED OCTOBER 3, 1988

PACKARD PRESS / LEGAL DIVISION, 10th & SPRING GARDEN STREETS, PHILA., PA. 19123 (215) 236-2000

154P

JOINT APPENDIX

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DIST.	OFF.	DOCKET YR.	DOCKET NUMBER	FILING DATE MO	DAY	YEAR	J	N/S	O	D PTF	D DEF	R 23	$ DEMAND	JUDGE MAG. NO.	COUNTY	JURY DEM.	DOCKET YR.	DOCKET NUMBER
313	02	86	2698	05	07	86	3	740	1				Nearest $1,000	I344AS M	88888		86	2698

PLAINTIFFS

RAILWAY LABOR EXECUTIVES' ASSOCIATION;
AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSN., DIVISION OF BRAC;
AMERICAN TRAIN DISPATCHERS ASSOCIATION;
BROTHERHOOD OF LOCOMOTIVE ENGINEERS;
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES;
BROTHERHOOD OF RAILROAD SIGNALMEN;
BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES;
BROTHERHOOD OF RAILWAY CARMEN OF THE UNITED STATES AND CANADA;
HOTEL EMPLOYEES & RESTAURANT EMPLOYEES INTERNATIONAL UNION;
INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS;
INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS;
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS;
INTERNATIONAL BROTHERHOOD OF FIREMEN

ARB N

| vs. |

DEFENDANTS

CONSOLIDATED RAIL CORPORATION

AND OILERS;
INTERNATIONAL LONGSHOREMEN'S ASSOCIATION;
NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION;
SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA;
SHEET METAL WORKERS INTERNATIONAL ASSOCIATION;
TRANSPORT WORKERS UNION OF AMERICA;
UNITED TRANSPORTATION UNION

CAUSE RAILWAY LABOR ACT 45 U.S.C. 51 *et seq.*
(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)

JA-2

ATTORNEYS

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Phila., PA 19103

Anita W. Schoomaker, Esq.
1800 M Street, N.W.
Suite 800 - North
Washington, DC 20036

DATE	NR.	C.A. 86-2698 AS	PROCEEDINGS
1986			
1 MAY	07		Complaint, filed.
— "	07		Sumons exit. (Mailed to counsel.)
2 "	07		MOTION AND ORDER APPOINTING BARBARA WRIGHT TO SERVE THE SUMMONS AND COMPLAINT UPON THE DEFENDANT IN THIS ACTION, FILED. 5/8/86: Entered and copies mailed.
3 "	12		Return of summons with affidavit of Barbara Wright re: "served deft. on 5/9/86," filed.
4 "	28		Answer filed.
— "	28		ISSUE JOINED.
5 NOV	03		ORDER DATED 11/3/86, SCIRICA, J., THAT THE DATES SPECIFIED IN THE 7/23/86 PRETRIAL ORDER BE EXTENDED IN THE FOLLOWING MANNER: ALL DISCOVERY, WITH THE EXCEPTION OF DEPOSITIONS, BE COMPLETED BY 1/30/87; ALL DEPOSITIONS BY 2/28/87; THIS CASE SHALL BE PLACED IN THE TRIAL POOL ON 3/27/87; FINAL JOINT PRETRIAL ORDER BY 3/20/87, ETC., FILED. 11/3/86: Entered and copies mailed.

JA-3

1987		
6 FEB	12	STIPULATION & ORDER AS TO CERTAIN FACTS, FILED. 2/13/87: Entered and copies mailed.
7 MAR	10	CONSOLIDATED RAIL CORP.'S MOTION TO DISMISS COMPLAINT & FOR SUMMARY JUDGMENT, MEMO., CERT. OF SERV., FILED.
8 "	27	PLFFS' MOTION FOR SUMMARY JUDGMENT, CERT. OF SERV., MEMO., FILED.
9 APR	17	Reply Memo. in Support of Consolidated Rail Corp's Motion to Dismiss Complaint & for Summary Judgment, Cert. of Serv., filed.
10 "	28	ORDER THAT PLFFS' COMPLAINT IS DISMISSED FOR LACK OF SUBJECT MATTER JURISDICTION, ETC., FILED. 4/28/87: Entered and copies mailed.
11 MAY	15	Plffs' Notice of Appeal, filed. (87-1289) 5/18/87: Entered and copies to: C.C. O'Brien, Esq., H.W. Wells, Esq., D.J. Morikawa, Esq., A.W. Schoomaker, Esq., Judge Scirica, D. Spitz, U.S.C.A.
12 "	18	Copy of Clerk's Notice to U.S.C.A., filed.
13 "	21	Copy of Transcript Purchase Order, filed.
— "	21	RECORD COMPLETE FOR PURPOSES OF APPEAL-TRANSCRIPT NOT NEEDED.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case Closed

DOCKET No. 87-1289

Related Cases _____ CALENDARED FOR: 11-3-87

See C.A. Misc. Record No. _____

ORIGIN:	Eastern	DOCKETED: 5-20-87
DC DOCKET NO.	Civil 86-2698	☒ Fee Paid ☐ IFP ☐ CJA ☐ USA
DC JUDGE	Anthony J. Scirica	☐ CPC Granted _____
FILED IN DC	5-7-86	
NOA FILED	5-15-87	DISCLOSURE Applt./Pet. 8-27-87
CASE TYPE	CV – Railway Labor Act	STATEMENT Appee./Resp. 5-27-87

TITLE OF CASE	APPEARANCES
RAILWAY LABOR EXECUTIVES' ASSOCIATION; AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSN., DIVISION OF BRAC; AMERICAN TRAIN DISPATCHERS ASSOCIATION; BROTHERHOOD OF LOCOMOTIVE ENGINEERS; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES; BROTHERHOOD OF RAILROAD SIGNALMEN; BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS,	APPELLANT/PETITIONER: Lawrence M. Mann, Esq. – 6-5-87 Alper & Mann 400 First Street, N.W., Suite 811 Washington, D.C. 20001 202-298-9191

EXPRESS AND STATION EMPLOYEES; BROTHERHOOD OF RAILWAY CARMEN OF THE UNITED STATES AND CANADA; HOTEL EMPLOYEES & RESTAURANT EMPLOYEES INTERNATIONAL UNION; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS, AND HELPERS; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION; NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION; SEAFARERS'; INTERNATIONAL UNION OF NORTH AMERICA; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION; TRANSPORT WORKERS UNION OF AMERICA; UNITED TRANSPORTATION UNION,

Appellants

vs.

CONSOLIDATED RAIL CORPORATION

APPELLEE/RESPONDENT:
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Michael J. Ossip, Esq. – 6/8/88
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Bruce B. Wilson/Jeffrey H. Burton – 6/8/88
Associate General Counsel – 6/8/88
Consolidated Rail Corporation
1138 Six Penn Center Plaza
Phila., PA 19103
215-977-5019 4041 [Wilson]/977-5001 [Burton]
[Appellee, Consolidated Rail Corporation]

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NO. 87-1289

RECORD, EXHIBITS & BRIEF INFORMATION/Filing:

5-26-87 Partial Rec. or Cert. List
____ Record on Appeal ☐ IMPOUNDED
Covers # ____
5-21-87 Not needed Transcript ordered None
____ Transcript filed in DC:

____ 1st Supp. Record
____ 2nd Supp. Record ____

____ Exhibits ☐ REC. RM. ☐ SAFE
____ Administrative Transcript
5-26-87 Briefing Notice Issued C5/26 Covers # ____
7-6-87 Brief for Applt. M.S. 7-6-87 (10cc)

8-3-87 Brief for Appee. M.S. 8-3-87 (10cc)
____ Brief for Appee. ____
____ Brief for Appee. ____
____ Reply B. for Applt. ____

____ Brief for Applt./ Cross Appee. ____
____ B. for Appee. Cross Applt./ ____

EXTENSION Flg. Motion for:	Ord. Fld.	Ext. to:
____ Record List		
____ Transcripts		
____ Applt's. Brief		
____ Appee's. Brief		
____ Appee's. Brief		
____ Appee's. Brief		
____ Reply Brief		

____ Appee. Appendix ____

RECORD & BRIEF INFORMATION (Co· ·):

Brief for Amicus ____

Brief for Intervenor ____

Appendix MS 7-6-87 10cc

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_____ Reply B. for Applt./
Cross Appee. _____

_____ Reply B. for Appee./
Cross Applt. _____

Appee. Appendix _____

Supp. Appendix _____

SUMMARY OF EVENTS
DISMISSALS: Rule 28 [ ] _____
ARGUED 11/3/87 — SEE BELOW
PANEL Sloviter, Becker, CJ & Cowen, DJ
REARGUED _____
JUDGMENT-ORDER _____
OPINION 4-25-88 ☐ Mem. Op. ☒ Signed ☐ P.C.N/P or Pub.
MO SLOVITER CO _____ DO _____
JUDGMENT Reversing & remanding to D.C. Costs
taxed against the appellee. (bj)

PET. FOR REHG. _____
☐ Denied ☐ Granted ☐ In Banc ☐ Panel

MANDATE FURTHER STAYED TO: 6-30-88
Rule 42(b) FURTHER STAYED TO 6-10-88
MANDATE STAYED TO: 6-1-88

MANDATE ISSUED _____
RECORD RETURNED _____
BILL OF COSTS 5-9-88 by
appellant, w/serv. (bj)

CERTIORARI FILED 6-30-88
☐ Denied ☒ Granted
10-3-88 S.C.# 88-1
Reported at 845 F2d 1187

DATE	FILINGS—PROCEEDINGS
1987	
Sept. 8	Copy of letter dd. 9-3-87 from Lawrence M. Mann, Esq., cnsel for aplts, purs. to Rule 28(j) FRAP, w/attachs., rec'd for the info. of the Ct. (sdt)
Sept. 18	Let dtd 9-18-87 from aplee rec'd for Ct's info. (ms)
Oct. 15	Letter dd. 10-13-87 from Cornelius C. O'Brien, Jr., Esq., cnsel for aplts, purs. to Rule 28(j) FRAP, w/attach., rec'd for info. of the Ct. (sdt)
Nov. 2	Letters dated 1-15-87 & 9-24-87 from aplt., rec'd for info. of the Court. (gt)
Nov. 3	At oral argmt. Ct. directed cnsl to have transcript of oral argmt. prepared for Ct. (ab)
Dec. 3	

Continued

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Railway

DOCKET NO. 87-1289

Page Two

DATE	FILINGS — PROCEEDINGS
1987	
Dec. 3	Letter from aplee. (Consolidated Rail Corp.) along with 7th Circuit's decision in appeal no. 87-1323, rec'd. (gt)
Dec. 4	Transcript of oral argument rec'd for info of Court. (as)
Feb. 8	Letter dated 2-1-88, pursuant to Rule 28(j), F.R.A.P. from aplt., rec'd. (gt)

May 5	Motion of appellee, (Conrail) for stay of Mandate, 30 days, to & including June 1, 1988, w/serv., fld. (bj)
May 6	Order (SLOVITER, C.J.) granting above motion to & incl June 1, 1988, fld. (bj)
May 27	Motion of Appellee (Conrail Corp) for Extension of Stay of Mandate, to and including July 24, 1988, w/serv. fld. (bj) (full 90 day stay) (bj)
June 1	Opposition to Motion of Appellee for Extension of Stay of Mandate, w/serv. fld. (bj)
June 2	Applee's Reply to Aplt's Opposition to Motion to Extend Stay of Mandate, w/serv., rec'd (bj)
June 6	Order (Sloviter, Becker & Cowen, C.J.'s) granting the stay of Mandate to and Including June 10, 1988, fld. (bj)
June 6	Copy of ltr dtd 6-2-88 from Cornelius C. O'Brien, Jr., Esq. addressed to Legal Dept. Con.Rail Corp. 1138 6 Penn Ctr Plaza Phila, PA, rec'd (bj)
June 7	Motion of Appellee Consolidated Rail Corp. for Reconsideration of this Ct's June 6, 1988 Order & for Extension of Stay of Mandate Until June 30, 1988, fld. (bj)
June 9	Order (Sloviter, Becker & Cowen, C.J.'s) granting the above Motion and the Stay of Mandate is extended until June 30, 1988, fld. (bj)
July 5	Certificate evidencing the docketing of this appeal from Clk of the Sup. Court, at S.C. #88-1 which was fild 6-30-88 in Sup. Ct., fld., (bj)

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

RAILWAY LABOR EXECUTIVES' ASSOCIATION
400 FIRST STREET, N. W.
WASHINGTON, D. C. 20001

and

AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSN., DIVISION OF BRAC
3 RESEARCH PLACE
ROCKVILLE, MARYLAND 20850

and

AMERICAN TRAIN DISPATCHERS ASSOCIATION
1401 S. HARLEM AVENUE
BERWYN, ILLINOIS 60402

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS
1112 B OF LE BUILDING
1365 ONTARIO AVENUE
CLEVELAND, OHIO 44114

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
12050 WOODWARD AVENUE
DETROIT, MICHIGAN 48203

and

CIVIL ACTION NO. 86-2698

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

BROTHERHOOD OF RAILROAD SIGNALMEN
601 WEST GOLF ROAD
MT. PROSPECT, ILLINOIS 60056

and

BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES
3 RESEARCH PLACE
ROCKVILLE, MARYLAND 20850

and

BROTHERHOOD OF RAILWAY CARMEN OF THE UNITED STATES AND CANADA
4929 MAIN STREET
KANSAS CITY, MISSOURI 64112

and

HOTEL EMPLOYEES & RESTAURANT EMPLOYEES INTERNATIONAL UNION
1219 28th STREET, N. W.
WASHINGTON, D. C. 20007

and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS
1300 CONNECTICUT AVENUE, N. W.
SUITE 200
WASHINGTON, D. C. 20036

and

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS
570 NEW BROTHERHOOD BUILDING
KANSAS CITY, KANSAS 66101

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
10400 W. HIGGINS ROAD, SUITE 720
ROSEMONT, ILLINOIS 60018

and

INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS
122 C STREET, N. W. SUITE 280
WASHINGTON, D. C. 20001

and

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION
17 BATTERY PLACE, SUITE 1530
NEW YORK, NEW YORK 10004

and

NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION
444 NORTH CAPITOL STREET, N. W.
SUITE 800
WASHINGTON, D. C. 20001

and

SEAFARERS' INTERNATIONAL UNION OF NORTH AMERICA
99 MONTGOMERY STREET

JERSEY CITY, NEW JERSEY 07302 :
:
and :
:
SHEET METAL WORKERS :
INTERNATIONAL ASSOCIATION :
5111 S. 8th ROAD, BUILDING 1, :
APT. 208 :
ARLINGTON, VIRGINIA 22204 :
:
and :
:
TRANSPORT WORKERS UNION OF :
AMERICA :
80 WEST END AVENUE :
NEW YORK, NEW YORK 10023 :
:
and :
:
UNITED TRANSPORTATION UNION :
14600 DETROIT AVENUE :
CLEVELAND, OHIO 44107 :
:
PLAINTIFFS, :
:
v. :
:
CONSOLIDATED RAIL CORPORATION :
:
DEFENDANT. :

Plaintiffs for their Complaint against the defendant in this matter hereby allege as follows:

NATURE OF THE ACTION

1. This action for declaratory and injunctive relief seeks to have declared invalid actions taken and to be taken by defendant in violation of the Railway Labor Act,

as amended, 45 U.S.C. §151 *et seq.* and the Fourth Amendment of the United States Constitution.

JURISDICTION AND VENUE

2. This Court has jurisdiction of this matter pursuant to 28 U.S.C. §§ 1331, 1337 and 2201. Venue of this Court is based upon 28 U.S.C. § 1391(c).

THE PARTIES

3. Plaintiff, Railway Labor Executives' Association (RLEA), is an unincorporated association whose membership consists of all the railway labor unions in the country which represent all crafts of railroad employees. The remaining plaintiffs, American Railway Supervisors' Assn., Division of BRAC; American Train Dispatchers' Assn.; Brotherhood of Locomotive Engineers; Brotherhood of Maintenance of Way Employees; Brotherhood of Railroad Signalmen; Brotherhood of Railway, Airline and Steamship Clerks, Freight Handlers, Express and Station Employes; Brotherhood of Railway Carmen of the United States and Canada; Hotel Employees and Restaurant Employees International Union; International Association of Machinists and Aerospace Workers; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers; International Brotherhood of Electrical Workers; International Brotherhood of Firemen and Oilers; International Longshoremen's Association; National Marine Engineers' Beneficial Assn.; Railroad Yardmasters of America; Seafarers' International Union of North America; Sheet Metal Workers' International Assn.; Transport Workers Union of America; and United Transportation Union are railway labor organizations and unincorporated associations representing various crafts of railroad workers in this country, consisting both of workers covered by the Hours of Service Act (45 U.S.C. 61 *et seq.*) and those not so covered. Plaintiffs United

Transportation Union, Brotherhood of Locomotive Engineers, Brotherhood of Railroad Signalmen, American Railway and Airway Supervisors Assn., Division of BRAC, and American Train Dispatchers' Association represent workers covered by the Hours of Service Act. Plaintiffs represent in collective bargaining all crafts of railroad workers, both covered and noncovered, employed on the defendant railroad, and are "representatives" of "employees" within the meaning of the Railway Labor Act, 45 U.S.C. §151. Plaintiffs bring this action on their own behalf and on behalf of their members and employees of defendant whom they represent.

4. Defendant Consolidated Rail Corporation (Conrail), was established by Act of Congress (45 U.S.C. § 741 *et seq.*) and is a corporation duly qualified to do business within the Commonwealth of Pennsylvania. Conrail is engaged in the interstate transportation of goods and commodities by rail in diverse states and is a carrier by railroad subject to Subtitle IV of the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.,* the Railway Labor Act, 45 U.S.C. § 151 *et seq.* and the Hours of Service Act (45 U.S.C. § 61 *et seq.*). Defendant operates a line of railroad and is doing business within the Court's judicial district and maintains an office within this district.

COUNT I

5. Section 2, First of the Railway Labor Act, (45 U.S.C. § 152, First) requires parties subject to its provisions to make and maintain contracts covering the rates of pay, rules and working conditions of employees of a carrier by railroad, § 2, Second, requires that all disputes between a carrier and its employees be considered in conference between designated representatives and § 2, Seventh, (45 U.S.C. § 152 Seventh) prohibits any changes in the "rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements

except in the manner prescribed in such agreements or in § 6 of the Act." (45 U.S.C. § 156). That section requires referral of disputes to the Mediation Board before any change may be made in "agreements affecting rates of pay, rules or working conditions."

6. Since its establishment and at all times material herein, plaintiffs and Conrail have been parties to various collective bargaining agreements governing the rates of pay, rules and working conditions negotiated pursuant to the Railway Labor Act (45 U.S.C. § 61 *et seq.*) for the defendant's employees not covered by the Hours of Service Act and to various work practices which have become an integral and implicit part of such agreement though not set forth therein.

7. Throughout these years, the employees represented by plaintiffs have been required to comply with a Rule G promulgated by defendant which prohibits use of alcoholic beverages, intoxicants or narcotics by employees subject to duty, or their possession, use or being under the influence thereof while on duty or on railroad property. During these years surveillance of Rule G has been by sensory observation by security personnel.

8. On July 29, 1985, the Federal Railroad Administration (FRA) promulgated a Rule entitled Control of Alcohol and Drug Use (49 C.F.R. § 219, *et seq.*). The application of that Rule was limited to employees covered by the Hours of Service Act, and by its terms is not applicable to employees not subject to the Hours of Service Act.

9. Despite the fact that the Rule promulgated by FRA does not apply to employees not covered by the Hours of Service Act, nor authorizes testing of employees not covered by the Hours of Service Act, the defendant has subjected the non-covered employees to breathalyzer, urine and blood testing upon penalty of furlough or dismissal.

10. These actions by Conrail constitute a unilateral change in the major conditions of employment for

employees represented by plaintiffs' members not covered by the Hours of Service Act, which change or creation of a new rule where none existed is subject to the prior service of a notice upon plaintiffs and their constituent members pursuant to § 6 of the Railway Labor Act, 45 U.S.C. § 156. The required notice has not been given by Conrail to plaintiffs and their affected members.

11. Plaintiffs and their constituent members have protested the unilateral actions taken by the defendant and have attempted, without success, to negotiate on the subject matter of the unilaterally instituted toxicological testing program. Nonetheless, defendant has fully implemented its unilaterally promulgated surveillance program.

12. The actions and proposed actions of Conrail violate the rights of plaintiffs and the noncovered employees of Conrail which it represents as established and protected by § 2, First, Second and Seventh of the Railway Labor Act and constitute a violation of § 6 of the Act.

13. Unless the specified violations of the Railway Labor Act are enjoined and defendant Conrail is required to serve notice and bargain as specified by the Act prior to changing or creating new major conditions of employment, great and irreparable injury will be caused plaintiffs and the employees they represent and the public, which has an interest in securing compliance by railroad employers, as well as employees, with provisions of the Act.

14. Neither plaintiffs nor the employees represented by them have an adequate remedy to obtain good faith bargaining on the issues involved except from this Court or through the exercise of self-help.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that the Court:

A. Enter a judgment pursuant to 28 U.S.C. § 2201 declaring that the actions of Conrail in varying substantively and unilaterally the working conditions of their noncovered employees in the manner described herein violates §§ 1a and 2, First, Second and Seventh and Section 6 of the Railway Labor Act, (45 U.S.C. §§ 151a, 152, First, Second and Seventh and § 156) and that such actions and proposed actions are invalid and of no force and effect.

B. Enter such temporary and permanent injunctive relief as appears necessary and appropriate.

C. Grant plaintiffs their costs and reasonable attorney's fees and such other and further relief as may be equitable and proper.

COUNT II

15. Paragraphs 1-14 are realleged as if set forth herein in full.

16. Subpart C of the Regulation promulgated by the FRA (49 C.F.R. § 219.201 *et seq.*) imposes a mandatory obligation upon defendant to subject covered employees to blood and urine testing in the event of a major train accident, an impact accident or a fatal train incident. In disregard of these limitations of the events for which blood and urine testing is authorized, defendant has subjected and continues to subject all employees, both those covered by the Hours of Service Act and those not so covered, to toxicological testing upon return to work from furlough, for nonservice related illness or injury and for other situations and events not specified in the Regulation.

17. Subpart D of the FRA Regulation (49 C.F.R. § 219.301 *et seq.*) authorizes, but does not require,

defendant to administer breath and urine testing to covered employees in other accidents or incidents than those specified in Subpart C, in case of a certain specified rule violation, or upon reasonable suspicion based upon specific, personal observations by a supervisory employee concerning the appearance, behavior, speech or body odors of the employee. Urine testing, however, is authorized only by observation of at least two supervisory employees and, if the testing is based upon suspicion that the employee is under the influence of a controlled substance, at least one of each supervisory employee must have received three hours of training to detect signs of drug intoxication. In disregard for these limitations defendant has subjected and continues to subject all employees, both those covered by the Hours of Service Act and those not so covered, to both breath and urine testing without complying with the specified standards relating to supervisory employees.

18. Moreover, said employees are being held out of service pending the result of the drug screen, to their financial detriment.

19. These unilateral actions by Conrail constitute a major change in the conditions of employment for both covered and noncovered employees represented by plaintiffs. This change or creation of a new rule where none existed is subject to the prior service of a notice upon plaintiffs and their constituent members pursuant to § 6 of the Railway Labor Act, 45 U.S.C. § 156. The required notice has not been given by Conrail to plaintiffs and their affected members.

20. Plaintiffs and their constituent members have protested the unilateral actions taken by the defendant and have attempted, without success, to negotiate on the subject matter of the unilaterally instituted toxicological testing program. Nonetheless, defendant has fully implemented its unilaterally promulgated surveillance program.

21. These actions and proposed actions of Conrail in testing employees covered by the Hours of Service Act, as well as those not covered, violate the rights of plaintiffs and the covered and noncovered employees of Conrail which they represent as established and protected by § 2, First, Second and Seventh of the Railway Labor Act and constitute a violation of § 6 of the Act.

22. Unless the specified violations of the Railway Labor Act are enjoined and defendant Conrail is required to serve notice and bargain as specified by the Act prior to changing or creating new major conditions of employment, great and irreparable injury will be caused plaintiffs and the employees they represent and the public, which has an interest in securing compliance by railroad employers, as well as employees, with provisions of the Act.

23. Neither plaintiffs nor the employees represented by them have an adequate remedy to obtain good faith bargaining on the issues involved except from this Court or through the exercise of self-help.

PRAYER FOR RELIEF

WHEREFORE, plaintiff prays that the Court:

A. Enter a judgment pursuant to 28 U.S.C. § 2201 declaring that the actions of Conrail in varying substantively and unilaterally the working conditions of their **noncovered employees** in the manner described herein violate §§ 1a and 2, First, Second and Seventh and Section 6 of the Railway Labor Act, (45 U.S.C §§ 151a, 152, First, Second and Seventh and § 156) and that such actions and proposed actions are invalid and of no force and effect.

B. Enter such temporary and permanent injunctive relief as appears necessary and appropriate.

C. Grant plaintiffs their costs and reasonable attorney's fees and such other and further relief as may be equitable and proper.

COUNT III

24. Paragraphs 1 through 22 are realleged as if set forth herein in full.

25. Conrail was established by Act of Congress (45 U.S.C. § 741 *et seq.*) to provide a rail service system in the mid-west and northeast region of the country adequate to meet the needs and service requirements of that region and of the national transportation system. It is controlled by and largely financed by the Federal government. In this circumstance, the administration of toxicological testing by Conrail of its employees, both those covered by the Hours of Service Act and those not covered, constitutes federal action subject to the constitutional restrictions of the Fourth Amendment of the U. S. Constitution. The toxicological testing, which is being conducted without probable cause or reasonable suspicion violates, the Fourth Amendment.

WHEREFORE, plaintiffs pray that the Court:

A. Enter a judgment pursuant to 28 U.S.C. § 2201 declaring that the toxicological testing of Conrail of its employees, both those covered by the Hours of Service Act and those not covered, is subject to the provisions of the Fourth Amendment and that the toxicological testing program violates the applicable constitutional prohibitions of the Fourth Amendment.

B. Enter such temporary and permanent injunctive relief as appears necessary and appropriate.

C. Grant plaintiffs their cost and reasonable attorneys' fees and such other and further relief as may be equitable and proper.

Respectfully submitted,

ALPER, MANN & REISER

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LAWRENCE M. MANN

/s/ Jerome M. Alper
JEROME M. ALPER

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IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

RAILWAY LABOR EXECUTIVES' ASSOCIATION
400 FIRST STREET, N. W.
WASHINGTON, D.C. 20001

and

AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSN., DIVISION OF BRAC
3 RESEARCH PLACE
ROCKVILLE, MARYLAND 20850

and

AMERICAN TRAIN DISPATCHERS ASSOCIATION
1401 S. HARLEM AVENUE
BERWYN, ILLINOIS 60402

and

BROTHERHOOD OF LOCOMOTIVE ENGINEERS
1112 B OF LE BUILDING
1365 ONTARIO AVENUE
CLEVELAND, OHIO 44114

and

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES
12050 WOODWARD AVENUE
DETROIT, MICHIGAN 48203

and

CIVIL ACTION NO.
86-2698

ANSWER

BROTHERHOOD OF RAILROAD SIGNALMEN
601 WEST GOLF ROAD
MT. PROSPECT, ILLINOIS 60056

and

BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES
3 RESEARCH PLACE
ROCKVILLE, MARYLAND 20850

and

BROTHERHOOD OF RAILWAY CARMEN OF THE UNITED STATES AND CANADA
4929 MAIN STREET
KANSAS CITY, MISSOURI 64112

and

HOTEL EMPLOYEES & RESTAURANT EMPLOYEES INTERNATIONAL UNION
1219 28th STREET, N. W.
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and

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS
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WASHINGTON, D.C. 20036

and

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS
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and

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INTERNATIONAL LONGSHOREMEN'S ASSOCIATION
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and

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and

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION
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ARLINGTON, VIRGINIA 22204

and

TRANSPORT WORKERS UNION OF AMERICA
80 WEST END AVENUE
NEW YORK, NEW YORK 10023

and

UNITED TRANSPORTATION UNION
14600 DETROIT AVENUE
CLEVELAND, OHIO 44107

PLAINTIFFS,

v.

CONSOLIDATED RAIL CORPORATION

DEFENDANT.

Defendant, CONSOLIDATED RAIL CORPORATION ("Conrail"), by and through counsel, hereby answers the Complaint in this action, according to the numbered paragraphs thereof, as follows.

NATURE OF ACTION

1. It is admitted that Plaintiffs seek to bring an action for declaratory and injunctive relief under the

Railway Labor Act, as amended, and the Fourth Amendment of the United States Constitution, however, for the reasons set forth below, Defendant denies that any of its actions taken were in violation of either the statute or the Fourth Amendment.

JURISDICTION AND VENUE

2. It is admitted that Plaintiffs seek to invoke the jurisdiction of this Court in the manner alleged in Paragraph 1 of the Complaint, however, Defendant denies that this Court has jurisdiction for the reasons set forth below.

THE PARTIES

3. Defendant is without information or knowledge to affirm or deny the allegations regarding the constituency of the Railway Labor Executives' Association ("RLEA"). It is admitted that Plaintiffs are railway labor organizations representing various crafts of railroad workers in this country, including workers both covered and not covered by the Hours of Service Act, however, Defendant is without information or knowledge as to the corporate status of these organizations. It is denied that the Hotel Employees & Restaurant Employees International Union, the National Marine Engineers' Beneficial Association, or Seafarers' International Union of North America represent in collective bargaining any crafts of railroad workers employed by the Defendant. It is admitted that the remaining Plaintiffs represent in collective bargaining crafts of railroad workers, both covered and not covered by the Hours of Service Act, and are "representatives" of "employees" of Defendant within the meaning of the Railway Labor Act. It is admitted that among the workers represented by the United Transportation Union, Brotherhood of Locomotive Engineers, Brotherhood of Railroad Signalmen, the American Railway and Airways Supervisors Association, Division of

BRAC, and the American Train Dispatchers' Association are workers covered by the Hours of Service Act. Defendant is without information or knowledge to affirm or deny the remaining allegations of Paragraph 3 of the Complaint.

4. The allegations of Paragraph 4 of the Complaint are admitted.

COUNT I

5. Paragraph 5 is a conclusion of law, to which no response is necessary. To the extent a response is deemed necessary, it is denied.

6. It is admitted that Plaintiffs, (other than the Hotel Employees & Restaurant Employees International Union, National Marine Engineers' Beneficial Association and Seafarers' International Union) and Conrail are parties to various collective bargaining agreements governing the rates of pay, rules and working conditions negotiated pursuant to the Railway Labor Act for the Defendants' employees not covered by the Hours of Service Act, and that Defendant has from time to time established and enforced various work practices not set forth in collective bargaining agreements. Defendant denies the remaining allegations of paragraph No. 6.

7. It is admitted that some of Defendant's employees represented by some of the Plaintiffs have been required to comply with Rule G promulgated by Defendant. The provisions of Rule G speak for themselves, rendering unnecessary a response to Paragraph 7's interpretation of Rule G. Defendant denies the remaining allegations of Paragraph 7.

8. It is admitted that the Federal Railroad Administration promulgated a rule entitled Control of Alcohol and Drug Use, 49 C.F.R. Part 219, however, it is denied that said rule was promulgated on July 29, 1985. The

remainder of the allegations in Paragraph 8 are conclusions of law, to which no response is necessary. To the extent responses are deemed necessary, they are denied.

9. To the extent that Paragraph 9 states a conclusion of law, no response is necessary, however, to the extent a response is deemed necessary, it is denied. The remaining allegations of Paragraph 9 are denied.

10. - 14. The allegations of Complaint Paragraph 10 through 14 inclusive are denied.

COUNT II

15. Defendant's responses to Complaint Paragraphs 1 through 14, inclusive are incorporated herein by reference.

16. The allegations in the first sentence of Paragraph 16 are conclusions of law, to which no response is necessary; to the extent responses are deemed necessary, they are denied. The remaining allegations of Paragraph 16 of the Complaint are denied.

17. Sentences 1 and 2 of Complaint Paragraph 17 are conclusions of law, to which no response is necessary; to the extent responses are deemed necessary, they are denied. The remaining allegations of Paragraph 17 of the Complaint are denied.

18. The allegations of Paragraph 18 of the Complaint are denied.

19. - 23. The allegations of Complaint Paragraphs 19 through 23, inclusive are denied.

COUNT III

24. Defendant's responses to Paragraphs 1 through 22, inclusive are incorporated herein by reference.

25. It is admitted that Conrail was established by Act of Congress (45 U.S.C. § 741, *et seq.*). The remainder of the first sentence of Paragraph 25 is a conclusion of law to which no response is deemed necessary; to the extent

a response is deemed necessary, it is denied. The remaining allegations of Paragraph 25 are denied.

FIRST AFFIRMATIVE DEFENSE

Plaintiffs fail to state a claim for which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The Court is barred by the statute of limitations from considering actions complaining of conduct occurring more than six months prior to the filing and service of the Complaint.

THIRD AFFIRMATIVE DEFENSE

The Court is without jurisdiction under the Railway Labor Act over this action because the disputes alleged are "minor disputes" under the Railway Labor Act, Section 2(Fifth) 45 U.S.C. §152(a)(Fifth), and therefore are within the exclusive jurisdiction of the Railway Labor Act's grievance procedures.

FOURTH AFFIRMATIVE DEFENSE

Conrail is a private employer and is, by law, not an agency or instrumentality of the federal government. Thus, the Plaintiff's allegations do not give rise to a cause of action under the Fourth Amendment to the U.S. Constitution.

FIFTH AFFIRMATIVE DEFENSE

Defendant's past practice of establishing and changing both medical criteria and medical testing to assess employees' medical qualifications for work has been acquiesced in by the Plaintiffs and, therefore, is part of the established working conditions for Defendant's employees. Any dispute as to such practice is a minor

dispute. In the alternative there has been no change in the working conditions of employees represented by Plaintiffs.

SIXTH AFFIRMATIVE DEFENSE

The Court is without jurisdiction to grant injunctive relief or damages concerning "minor disputes" until such dispute has been fully processed and disposed of in accordance with the grievance procedure established by the Railway Labor Act, §§ 2 and 3, 45 U.S.C. §§ 152, 153. Plaintiffs cannot establish the irreparable harm requirement for the issuance of injunctive relief in that the traditional remedies available before the Adjustment Boards are fully adequate to compensate employees subjected to improper toxological [toxicological] testing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Dennis J. Morikawa, hereby certify that copies of the within Answer were served on opposing counsel by mailing copies thereof by first class mail, postage pre-paid to the following addresses:

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/s/ Dennis J. Morikawa
Dennis J. Morikawa

Dated: May 28, 1986

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAILWAY LABOR EXECUTIVES' ASSOCIATION 400 FIRST STREET, N. W. WASHINGTON, D. C. 20001	:	
and	:	
AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSN., DIVISION OF BRAC 3 RESEARCH PLACE ROCKVILLE, MARYLAND 20850	:	
and	:	CIVIL ACTION NO. 86-2698
AMERICAN TRAIN DISPATCHERS ASSOCIATION 1401 S. HARLEM AVENUE BERWYN, ILLINOIS 60402	:	DEFENDANT CONSOLIDATED RAIL CORPORATION'S ANSWERS AND OBJECTIONS TO PLAINTIFFS' INTERROGATORIES
and	:	
BROTHERHOOD OF LOCOMOTIVE ENGINEERS 1112 B OF LE BUILDING 1365 ONTARIO AVENUE CLEVELAND, OHIO 44114	:	
and	:	
BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES 12050 WOODWARD AVENUE DETROIT, MICHIGAN 48203	:	
and	:	

BROTHERHOOD OF RAILROAD SIGNALMEN
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:
and :
:
UNITED TRANSPORTATION UNION :
14600 DETROIT AVENUE :
CLEVELAND, OHIO 44107 :
:
PLAINTIFFS, :
:
v. :
:
CONSOLIDATED RAIL CORPORATION :
:
DEFENDANT. :

DEFENDANT CONSOLIDATED RAIL CORPORATION'S ANSWERS AND OBJECTIONS TO PLAINTIFFS' INTERROGATORIES

Defendant Consolidated Rail Corporation (hereinafter "Conrail"), hereby objects to certain of Plaintiffs' Interrogatories and hereby responds to certain of Plaintiffs' Interrogatories in accordance with the numbered paragraphs thereof as set forth below. The answers set

forth below are submitted subject to the objections contained herein and without waiving any of those objections.

The information set forth below is based upon Conrail's current knowledge of the facts of this matter and its investigation to date. That investigation is continuing and Conrail reserves the right to amend, supplement or modify these answers as may be necessary or appropriate in the future.

INTERROGATORIES, ANSWERS AND OBJECTIONS

1. When did defendant first initiate urinalysis tests for alcohol and/or drugs?

ANSWER: Conrail, through its physicians, has conducted urine testing of its employees for drugs/alcohol since at least 1978.

2. Did such testing apply both to employees covered by the Hours of Service act and those not covered?

ANSWER: Yes.

3. State the employee crafts which are subject to the testing.

ANSWER: Conrail has conducted urine testing of all employees of all crafts.

4. Did defendant notify the affected employees of the institution of the testing when defendant first initiated urinalysis tests for alcohol and/or drugs? If so, identify the notice, give the date of the notice and state the manner in which notice was given.

ANSWER: Conrail contends that no notice was required. However, employees whose urine was tested for the presence of drugs/alcohol were always told before they provided a urine specimen that such testing would be conducted.

5. With respect to the employee crafts which were subject to the first program for toxicological testing of urine, state the occasions, circumstances, and/or incidents for which such testing was required.

ANSWER: Conrail objects to Interrogatory No. 5 on the grounds that the term "first program" refers to urine testing for drugs/alcohol that took place in 1978, such testing was conducted at the discretion of the examining physician.

6. Is toxicological testing of urine required for any employee crafts other than those identified above? If so, identify the employee crafts made subject to such testing and state when the requirement was imposed for each such craft.

ANSWER: See response to Interrogatory No. 3.

7. With respect to each employee craft identified in Question 6, state the occasions, circumstances and/or incidents for which such testing was required.

ANSWER: To the extent Interrogatory No. 7 refers to the time period prior to 1984, see response to Interrogatory No. 5. In 1984, Conrail promulgated its Medical Standards Manual, relevant portions of which are attached hereto as Attachment 1, and for a six-month period, tested some employees pursuant to the provisions contained therein. Currently, Conrail tests employees of all crafts under the following circumstances: (1) as part of a pre-employment physical examination; (2) at the discretion of the examining physician as part of a return-to-duty or periodic physical examination; and (3) when an employee voluntarily agrees to undergo such testing. In addition, Conrail conducts post-accident testing of employees covered by the Hours of Service Act, as required by the regulations recently promulgated by the Federal Railroad Administration, at 49 C.F.R. §219 *et seq.*

8. With respect to each employee craft identified in Question 6, state whether defendant notified the affected employees of the institution of such testing and, if so, give the date of the notice, the form of the notice and state the manner in which the notice was given.

ANSWER: See response to Interrogatory No. 4. In addition, in October, 1985, Conrail posted a notice, attached hereto as Attachment 2, announcing the rules promulgated by the Federal Railroad Administration at 49 C.F.R. §219 *et seq.* Moreover, in February, 1986, Conrail sent a pamphlet to all employees, attached hereto as Attachment 3, which also announced the rules promulgated by the Federal Railroad Administration at 49 C.F.R. §219 *et seq.*

9. Does defendant require periodic physical examinations of employees? If so, identify the crafts subject to periodic physical examinations and state when such examinations were first required for each employee craft.

ANSWER: Yes. Conrail has required periodic physical examinations of employees since its inception in 1976. The crafts for which such examinations are required are set forth on p. 12 of Conrail's Medical Standards Manual, attached hereto as Attachment 1. Upon information and belief, Conrail's predecessor railroads also required periodic physical examinations of employees of all crafts. Conrail is without knowledge or information sufficient to form a belief as to when its predecessor railroads first required periodic physical examinations of employees.

10. State when toxicological testing of urine was first required for each employee craft as part of the periodic physical examination.

ANSWER: Since at least 1978, Conrail's physicians have required certain employees to undergo urine testing for drugs/alcohol as part of their periodic physical examination. Conrail is without knowledge or information sufficient to form a belief as to when its predecessor railroads first conducted urine testing for drugs/alcohol as part of a periodic physical examination.

11. Were employees notified of the addition of the testing of urine for alcohol and/or drugs as part of the periodic physical examination? If so, identify the employee crafts to which any notice was given, the form of the notice given to each craft, the date of

each such notice and the manner in which the notice was given.

ANSWER: See response to Interrogatory No. 4.

12. How frequently are periodic physical examinations given? If the frequency varies as to crafts and/or to age [sic].

ANSWER: Periodic physical examinations are currently conducted every three years up to and including age 50 and every two years thereafter, with exceptions as noted on page 12 of the Medical Standards Manual, attached hereto as Attachment 1.

13. Has there been any change in the frequency of the periodic physical examinations for any craft? If so, state when such change was made.

ANSWER: There has been no change in the frequency of periodic physical examinations since the Medical Standards Manual was issued on April 1, 1984.

14. Does the defendant require a physical examination of employees upon return to duty?

ANSWER: Yes.

15. If your answer to the previous question is affirmative, identify the employee crafts subject to physical examinations upon return to duty and state when such examinations were first required for each employee craft.

ANSWER: Conrail has required physical examinations upon return to duty for employees of all crafts since its inception in 1976. Conrail is without knowledge or information sufficient to form a belief as to when its predecessor railroads first required physical examinations for employees upon their return to duty.

16. State when toxicological testing of urine was first required for each employee craft as part of return to duty physical examination.

ANSWER: Conrail is without knowledge or information sufficient to form a belief as to when urine testing was first required for employees of its predecessor railroads as part of a physical examination upon return to duty.

Since at least 1978, Conrail's physicians have required some employees to undergo urine testing upon return to duty.

17. Is the requirement for physical examinations dependent upon a specific minimum time of absence of duty? If so, state the time requirement and whether the time requirement varies with the cause of the absence from duty or with the employee's craft and provide the relevant time factors.

ANSWER: Yes. See pp. 15-17 of the Medical Standards Manual, attached hereto as Attachment 1.

18. Were employees notified that the testing of urine samples for alcohol and/or drugs would be done routinely as part of all return to work physical examinations? If so, identify the employee crafts to which any notice was given, the form of the notice given to each craft, the date of each such notice and the manner in which the notice was given.

ANSWER: See response to Interrogatory No. 4.

19. Has the defendant in the past, or does the defendant now, subject employees to blood testing of alcohol and drugs? If so, provide information a) as to when such testing was initiated for each employee craft subject to such testing, b) the occasions, circumstances and/or incidence for which such testing was and/or is required and c) the date, form and manner of given notice to affected employees of the institution of such testing.

ANSWER: Yes.

a) Since Conrail's inception in 1976, Conrail's physicians and supervisors have asked certain employees to voluntarily undergo blood testing. Upon information and belief, Conrail's predecessor railroads also asked employees to voluntarily undergo blood testing. Conrail is without knowledge or information sufficient to form a belief as to when its predecessor railroads first asked employees to undergo blood testing.

b) Conrail currently requires employees to undergo blood testing as set forth in the regulations recently promulgated by the Federal Railroad Administration at 49 C.F.R. §219 *et seq.* Since Conrail's inception in 1976, Conrail's physicians have asked employees to voluntarily undergo blood testing, when in the physician's judgment, such testing was warranted. Upon information and belief, Conrail's predecessor railroads also occasionally asked employees to voluntarily undergo blood testing when, in the physician's judgment, such testing was warranted.

c) See response to Interrogatory No. 4. Conrail has notified all employees of its intention to utilize blood testing as required by the recent regulations promulgated by the Federal Railroad Administration at 49 C.F.R. §219 *et seq.* Copies of these notifications are attached hereto as Attachments 2 and 3.

20. State the permissible level for alcohol in urine and blood and the permissible level for each of the various drugs for which urine and blood are tested.

ANSWER: Conrail has not established any "permissible levels" for alcohol or drugs in the urine or blood.

21. Does defendant have a General Rule or Rules relating to use of alcohol and drugs by employees? If so identify the Rule or Rules and, if separate Rules apply to employees covered by the Hours of Service Act and those not covered, identify the Rules applicable to each such category.

ANSWER: Yes. Rule G, which applies to all employees in Conrail's Transportation department, states:

> The use of intoxicants, narcotics, amphetamines, or hallucinogens by employees subject to duty, or their possession or use while on duty, is prohibited.
>
> Employees under medication before or while on duty must be certain that such use will not affect the safe performance of their duties.

In addition, Conrail has promulgated Safety Rules, which apply to various groups of employees and which include regulations relating to the use of drugs and/or alcohol. Copies of these rules are attached thereto as Attachments 4-10.

22. When was the Rule or Rules presently in effect instituted relating to use of alcohol and drugs by employees covered by the Hours of Service Act and employees not covered?

ANSWER: Conrail is without knowledge or information sufficient to form a belief as to the exact date when Rule G and the Safety Rules referred to in its response to Interrogatory No. 21 were instituted. Both Rule G and the Safety Rules have been in effect since at least the time of Conrail's inception in 1976.

23. Was notice of the adoption of the Rule or Rules presently in effect given to employees and, if so, indicate the form and manner of providing the notice and when such notice was given.

ANSWER: Conrail is without knowledge or information sufficient to form a belief as to whether employees were given notice of the adoption of Rule G and the Safety Rules referred to in Interrogatory No. 21. However, all employees of Conrail's Transportation Department are given copies of the booklet containing Rule G when they are initially hired. In addition, all employees who work in the areas for which Safety Rules relating to the use of drugs and alcohol have been promulgated are given booklets containing these rules when they are initially hired, as well as on each occasion when the rules are revised.

/s/ Joseph J. Costello
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Of Counsel:

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Attorneys for Defendant
Consolidated Rail Corporation

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answers and Objections to Plaintiffs' Interrogatories to Defendant was served upon counsel for the Plaintiffs by first class mail, postage prepaid at the following address: Jerome M. Alper, Esq., Alper, Mann & Reiser, Suite 811, 400 First Street, N.W., Washington, D.C. 20001.

DATED: 9/23/86

/s/ Joseph J. Costello
JOSEPH J. COSTELLO

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,	:	
PLAINTIFFS,	:	
v.	:	CIVIL ACTION NO. 86-2698
CONSOLIDATED RAIL CORPORATION,	:	
DEFENDANT.	:	

PLAINTIFFS' ANSWERS AND OBJECTIONS
TO DEFENDANT'S INTERROGATORIES

Plaintiffs hereby object to certain of Defendant's Interrogatories and hereby respond to certain of Defendant's Interrogatories in accordance with the numbered paragraphs thereof set forth below. The answers set forth below are submitted subject to the objections contained herein and without waiving any of those objections.

The information set forth below is based upon Plaintiffs' current knowledge of the facts of this matter and its investigation to date. That investigation is continuing and plaintiffs reserve the right to amend, supplement or modify these answers as may be necessary or appropriate in the future.

INTERROGATORIES, ANSWERS AND OBJECTIONS

1. Identify all correspondence between Plaintiffs' officials and Conrail that refers or relates in any way to drug and/or alcohol testing of employees.

ANSWER: Plaintiffs object to Interrogatory No. 1 for the following reasons:

a. The information requested is necessarily in the possession of the defendant and the development of the requested information by plaintiffs would be duplicative and would not provide defendant with any information not already available to it.

b. The development of the requested information by plaintiffs would be necessarily burdensome. The 18 National Union Organizations which are plaintiffs have in the aggregate several hundred Local Chairmen who represent the 20,000 or so employees of defendant who are members of the Plaintiff Organizations and handle the day-to-day relations between those members and the defendant.

c. The information requested is not relevant nor calculated to lead to the discovery of admissible evidence. the dispositive issue is whether the unilateral imposition by Defendant of urine testing for alcohol and drugs as part of in-service periodic medical examinations and medical examinations required upon return to service from furlough or illness constitutes a change in working conditions subject to section 6 of the Railway Labor Act, 45 U.S.C. 156, and if so, whether the notice and other procedures specified in that section were complied with. The information sought has no relevance to these dispositive issues.

d. The information sought is not material. In its Answers to the Interrogatories propounded by Plaintiffs, Defendant has admitted that in 1984 it unilaterally instituted toxicological testing of urine for alcohol and drugs for employees of all crafts as part of return-to-duty and periodic physical examinations (Answer to Interrogatory 7) and that no prior notice was given for the required toxicological testing of non-covered employees and for the toxicological testing of both covered and

non-covered employees as part of return-to-duty and periodic medical examinations. (Answers to Interrogatories 4 and 7).

2. Identify any conversation(s) between Plaintiffs' officials and any employee(s) or representative(s) of Conrail concerning drug and/or alcohol testing of employees.

ANSWER: See Answer to Interrogatory 1.

3. Identify any documents, including, but not limited to, internal union memoranda or correspondence, that refer or relate in any way to drug and/or alcohol testing of Conrail employees.

ANSWER: See paragraphs b, c and d of Answer to Interrogatory 1.

4. Identify all grievances or "minor disputes" filed by Plaintiffs' officials or any past or current Conrail employee challenging Conrail's right to conduct drug and/or alcohol testing of employees.

ANSWER: See Answer to Interrogatory 1.

5. Identify all correspondence between Plaintiffs' officials and Conrail that refers or relates in any way to Conrail's medical examinations of employees.

ANSWER: See Answer to Interrogatory 1.

6. Identify any conversations between Plaintiffs' officials and employee(s) or representative(s) of Conrail concerning Conrail's medical examinations of employees.

ANSWER: See Answer to Interrogatory 1.

7. Identify any documents, including, but not limited to, internal union memoranda or correspondence, that refer or relate in any way to Conrail's medical examinations of employees.

ANSWER: See paragraphs b, c and d of Answer to Interrogatory 1.

8. Identify all grievances or "minor disputes" filed by Plaintiff's officials or any past or current Conrail employee challenging Conrail's medical examination procedures.

ANSWER: See Answer to Interrogatory 1.

9. Identify all grievances or "minor disputes" filed by Plaintiff's officials or any past or current Conrail employee challenging disciplinary measures taken by Conrail based, in whole or in part, on the results of drug and/or alcohol testing.

ANSWER: See Answer to Interrogatory 1.

10. With respect to paragraph 7 of Plaintiffs' Complaint, set forth the factual basis for the allegation that "surveillance of Rule G has been by sensory observation by security personnel."

ANSWER: Donald Swanson, Vice President – Transportation of the Consolidated Rail Corporation testified in the rulemaking proceedings before the Federal Railroad Administration on Control of Alcohol and Drug Use, Docket No. RSOR-6 in September 1983, that "regular, company-wide – but not personally intrusive – supervisory observations of operating employees have long been standard practice for Conrail and have proven highly beneficial." At p. 174 (Attachment 1). Mr. Swanson further testified that "I don't think there should be a day go by probably that the employees are not observed in some fashion." At p. 180 (Attachment 1). A letter from R. E. Sweart, Vice President, Labor Relations, to John F. Sytsma, dated November 17, 1983, states "Our experience . . . indicates that supervisory personnel and employee representatives acquire the capability to identify behavior which may be caused by alcohol and drug use. . . ." (Attachment 2).

11. With respect to paragraph 9 of Plaintiffs' Complaint, set forth the factual basis for the allegation that "the defendant has subjected the non-covered employees to breath analysis, urine, and blood testing upon penalty of furlough or dismissal."

ANSWER: In the rulemaking hearings referred to in Answer to Interrogatory 10, Mr. Swanson testified that "Under the Conrail program, once an employee is determined to have violated Rule G, he or she must be

disciplined . . . it is our experience that discipline – removal from service and other financial penalty and potential reinstatement – is essential in prompting employees to solve their performance problems and to get help. At p. 176 (Attachment 1).

12. With respect to paragraphs 10 and 19 of the Plaintiffs' Complaint, set forth the factual basis for the allegation that Conrail "creat[ed] a new rule where none existed. . . ."

ANSWER: Prior to April 1, 1984, enforcement of Rule G was by sensory observation by supervisory personnel. Effective April 1, 1984, Conrail instituted the requirement for all employees for toxicological testing of urine for alcohol and drugs in the periodic physical examination and in the physical examinations for return from furlough, leave, suspicion or similar causes. The inclusion of drug screening of urine as part of physical examinations constitutes a new rule affecting working conditions.

13. With respect to paragraphs 11 and 20 of Plaintiffs' Complaint, identify the individuals who "have protested" and "attempted, without success, to negotiate on the subject matter of the unilaterally instituted toxicological testing program". Identify any conversations or documents which set forth the substance of Plaintiffs' purported protests and attempts to negotiate.

ANSWER: Since the testing program was unilaterally instituted without notice by the carrier as required by 45 U.S.C. 156, there was no opportunity for plaintiff to protest prior to the effective date of the change in working conditions. Plaintiffs' have no information at this time on the identity of the individuals who protested or sought to negotiate with respect to the unilaterally instituted toxicological testing program.

14. With respect to paragraph 16 of Plaintiff's Complaint, set forth the factual basis for the allegation that Conrail "[i]n disregard of these limitations of the events for which blood and urine testing is authorized

. . . has subjected and continues to subject all employees, both those covered by the Hours of Service Act and those not so covered, to toxicological testing upon return to work from furlough, for non-service related illness or injury and for other situations and events not specified in the Regulation."

ANSWER: See Answer to Interrogatory 12.

15. With respect to paragraph 17 of Plaintiffs' Complaint, set forth the factual basis for the allegation that Conrail, "[i]n disregard for these 1 mitations . . . has subjected and continues to subject all employees, both those covered by the Hours of Service Act and those not so covered, to both breath and urine testing without complying with the specified standards relating to supervisory employees."

ANSWER: Defendant does not limit urine testing for alcohol and drugs to reasonable suspicion based on specific, personal observations by supervisory employees, but without reasonable suspicion subjects employees to toxicological testing of urine in regular periodic and return to work physical examinations.

16. With respect to paragraph 18 of Plaintiffs' Complaint, set forth the factual basis for the allegation that "said employees are being held out of service pending the result of the drug screen, to their financial detriment."

ANSWER: Mr. Swanson testified at the Federal Railroad Administration rulemaking proceedings that "it is our experience that discipline, removal from service or other financial penalty and potential reinstatement – is essential in prompting employees to solve their performance problems and to get help." At p. 176 (Attachment 1).

By letter dated May 22, 1986, from M. J. Maloof, General Chairman, General Committee of Adjustment, United Transportation Union, to K. F. Schwab, Senior Director, Labor Relations, for defendant, it was reported

that Trainman L. Bernard was held out of service pending results of a physical examination. (Attachment 3).

17. Identify each and every exhibit and document that you have reason to believe you may use in the prosecution of this lawsuit.

ANSWER: Plaintiff refuses to identify the requested documents on the grounds that they are covered by the lawyer-client privilege and the work product exemption.

ALPER, MANN & REISER

BY /s/ Jerome M. Alper
JEROME M. ALPER
SUITE 811
400 FIRST STREET, N. W.
WASHINGTON, D. C. 20001
(202) 298-9191

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of October, 1986, a copy of the foregoing Answers and Objections to Defendant's Interrogatories was mailed, postage prepaid, to:

Dennis J. Morikawa, Esquire
Joseph J. Costello, Esquire
2000 One Logan Square
Philadelphia, Pennsylvania 19103

Hermon M. Wells, Esquire
Consolidated Rail Corporation
Six Penn Center Plaza
Philadelphia, Pennsylvania 19183-2959

/s/ Jerome M. Alper
JEROME M. ALPER

ATTACHMENT 1

• • •

Option III, which recommends establishing criteria for supervisory observations, would tackle the problem of drug and alcohol use with prevention as the objective.

Regular, company-wide — but not personally intrusive — supervisory observations of operating employees have long been standard practice for Conrail and have proven highly beneficial.

They are observations of safety performance and of proficiency as well as fitness for work.

The effectiveness of these observations is being markedly strengthened by the Management Awareness Program which I previously mentioned. Conrail's managers and supervisors, including those not engaged in operations, are being trained to detect alcohol and drug use on the job, and the effects on employee performance of alcohol and drug use wherever they may occur.

Supervision is being instructed in how to respond and what action to take when alcohol or drug use is detected or suspected. The theme is to recognize it, stop it,

• • •

Conrail opposes bypass agreements outlined in Option VI for several reasons. First, we are unaware of any consequential benefits resulting from them in terms of prevention or deterrence.

Second, these agreements confuse enforcement with treatment by permitting the "bypass" of sanctions and discipline. In fact, bypass agreements would be inconcsistent [sic] with a federal rule prohibiting on-duty use of alcohol and drug abuse.

Under the Conrail program, once an employee is determined to have violated Rule G, he or she must be disciplined. The employee may also be encouraged to seek help through the Employee Assistance Program,

but it is not an either/or proposition for a very important reason: it is our experience that discipline — removal from service or other financial penalty and potential reinstatement — is essential in prompting employees to solve their performance problems and to get help. As it turns out, in many cases that performance problem is connected to a dependency on alcohol or drugs.

• • •

MR. SWANSON: Well, it's a requirement of operating supervision on our property and I think on most property to make observations daily. They are made daily.

They are formalized by various reports from the railroads indicating the type of observation, how often it is and goes on the employee's record.

I don't think there should be a day go by probably that the employees are not observed in some fashion. In addition to that form of plan, we at Conrail have another plan that we use to make certain that every crew — and I include the whole crew — as observed by the supervisory personnel in that area at least once a month. Every crew on every scheduled job is observed either coming on to duty or before they go off duty so that we can check the fitness from that point of view.

I don't think there can be too much in the way of observation — but formally, it should be done on a daily basis on whatever specific elements you might be driving at.

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ATTACHMENT 2

R. E. SWERT
VICE PRESIDENT
LABOR RELATIONS

November 17, 1983

Mr. John F. Sytsma, President
Brotherhood of Locomotive Engineers
B. of L. E. Building
Cleveland, OH 44114

Dear Mr. Sytsma:

We appreciated the opportunity for extensive discussion of the problems of alcohol use, including by-pass agreements, employee assistance programs, and our alcohol-drug awareness training when we met October 13, 1983. Because of our own continuing efforts to prevent alcohol and drug use by employees and to provide assistance to them when use becomes a problem, it was particularly encouraging to become aware of the strong interest of the Brotherhood of Locomotive Engineers and that you too share our concerns.

I understand that the purpose of the Brotherhood of Locomotive Engineers in advocating by-pass agreements is to establish conditions which will encourage peer referral of employees to deter alcohol or drug use which could impair their own well being as well as endanger the safety of operations. However, as explained when we met, we are not confident that by-pass agreements can significantly achieve that purpose. We are glad to have the information you have given us about by-pass agreements on other railroads. Those agreements which exist, however, are relatively recent and the data with respect to their effectiveness is both limited and inconclusive. Through Conrail's Manager-Employee Assistance, John Gorman, we will remain in contact with the railroads which have by-pass agreements to keep abreast of their application in practice and

their contribution to accomplishing peer referral. Although we are not convinced that by-pass agreements are a solution to breaking the "conspiracy of silence," we plan to keep them under consideration as a possible part of the solution.

The recently concluded FRA meeting on voluntary measures to prevent alcohol and drug use has provided us with an additional means to examine by-pass agreements that are in effect or are being considered. Through the committees established by the FRA and from the information obtained by John Gorman, we feel that we will be in a much better position to assess the efficacy of by-pass agreements at Conrail.

Conrail, at the same time, will continue its several efforts to prevent alcohol and drug use because of their harm to employees and impairment to safety and operations. These efforts will include continuation of our Management Awareness Program. Our experience with it thus far (some 900 participants) indicates that supervisory personnel and employee representatives acquire the capability to identify behavior which may be caused by alcohol and drug use and are motivated to refer employees for assistance before discipline. As the result of their joint participation in this training, we know that employees' supervisors and union representatives have cooperated in referral and we are confident that such cooperation in the interest of employees will occur with increasing frequency. Your willingness to assist has been most encouraging and is deeply appreciated.

Again, thank you for the material on by-pass agreements and for your support of Conrail's efforts to aid employees through deterrence of alcohol and drug use.

Sincerely,

R. E. Swert
Vice President – Labor Relations

ATTACHMENT 3

M. G. Maloof
Chairman

617-799-5859

R. S. Connors
Vice Chairman

G. T. Casey
Secretary

united transportation union
General Committee of Adjustment, GO-081
50 FRANKLIN ST., SUITE 375,
WORCESTER, MA. 01608

May 22, 1986

Mr. K. F. Schwab
Senior Director Labor Relations
Consolidated Rail Corporation
Six Penn Center Plaza, Room 1234
Philadelphia, Pennsylvania 19103-2959

Dear Sir:

This is in regard to the Conrail policy concerning trainmen who have been rejected for employment with Amtrak because of alleged physical disqualification.

Trainman L. Bernard is such an employee. He was rejected by Amtrak because he is alleged to have had a positive result in a drug screen test conducted as part of a pre-employment physical examination required by Amtrak due to their assumption of employees in OFF-CORRIDOR service.

After being rejected for employment with Amtrak Trainman Bernard was ordered by Chief Crew Dispatcher F. J. Wrinn to report for a physical examination by the Conrail Medical Services Department at Selkirk, NY on April 23, 1986. He was also removed from the extra board, (out of service), pending results of the "Physical Examination".

On April 23, 1986 Trainman Bernard was examined by a medical assistant at the Conrail facility in Selkirk, NY at which time he was subjected to a urine test. After the examination was given no information concerning

his physical condition but he was told that it would take about a week to get the results of the drug screen. He remained out of service.

On May 3, 1986 Trainman Bernard received a copy of his "MD-40" which did state that he was "MEDICALLY DISQUALIFIED".

Subsequently during discussion with Conrail Manager Labor Relations J. F. Glass concerning Mr. Bernards status with Conrail I was informed by Mr. Glass that Amtrak had not told Conrail the reason that Mr. Bernard had been rejected and that Amtrak had at no time given Conrail any information as to the results of Amtraks' drug tests.

Further, Mr. Glass stated that as of this time it is Conrails' policy that Mr. Bernard was simply medically disqualified until such time as his own doctor could certify to the carrier that his system was free of drugs.

This committee has serious doubts as to the handling of this matter by both Amtrak and Conrail. It is our feeling at this time that Mr. Bernard's rights were violated, both contractual and legal.

Contractually because Mr. Bernard had his regular periodic physical in 1985 and he was in compliance with Conrail rules at the time he was removed from service. He was further held out of service after taking his examination even though he was not given a reason for being medically disqualified.

Rule 96 (a) of our agreement states that the trainman shall be furnished a copy of the medical report containing the reason for disqualification. This was not done in Mr. Bernards' case.

Further, this committee is unaware of any agreement either written or implied that gives the carrier a right to make periodic or arbitrary test for drugs.

The FRA has listed the requirements for drug testing and the above case does not in any way resemble the circumstances outlined in the FRA Regulations.

Legally because if Amtrak did supply Conrail with the results of their drug test they violated the law. If they did not give Conrail the test results the question arises as to why Conrail coincidentally gave a drug test to an active employee for no discernible reason.

Would you please investigate and advise this committee if Amtrak furnished Conrail with information regarding their physical examination of Trainman Bernard. Would you also advise this committee of the carriers' position as to drug tests at periodic physical examinations. We want to know now if you intend to conduct these tests in an arbitrary manner or if you are going to confine your testing to the circumstances outlines in the FRA Regulations.

Please acknowledge and advise, I remain

Very truly yours,

M. G. Maloof
General Chairman

cc. L. Bernard
S. T. Cowles, Local Chairman
R. E. Frear, General Chairman
Clint Miller, UTU International
E. F. Lyden, UTU-VP

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*, *Plaintiffs*,	)	
v.	)	Civil Action NO. 86-2698
CONSOLIDATED RAIL CORPORATION, *Defendant*.	)	

STIPULATION

In the interest of obviating the need for extensive discovery, counsel for Plaintiff Unions and counsel for Defendant Consolidated Rail Corporation (hereinafter "Conrail") hereby agree to the following facts:

1. Since at least the time of Conrail's inception in 1976, Conrail employees, both those covered by the Hours of Service Act, 45 U.S.C. §§61-64d (hereinafter "the Act"), and those not covered by the Act, have been subject to the provisions of Rule G or rules that are identical in substance to Rule G. Rule G provides:

> The use of intoxicants, narcotics, amphetamines or hallucinogens by employees subject to duty, or their possession or use while on duty, is prohibited. Employees under medication before or while on duty must be certain that such use will not affect the safe performance of their duties.

2. Conrail has relied upon two methods of enforcing Rule G: 1) supervisory observation; and 2)

encouraging employees who are suspected of being drug or alcohol abusers to voluntarily agree to undergo blood, urine or other diagnostic tests.

3. In August, 1985, the Federal Railroad Administration of the United States Department of Transportation promulgated regulations at 49 C.F.R. §219 *et seq.*, mandating post accident toxicological testing for railroad employees covered by the Hours of Service Act. These regulations became effective on February 10, 1986.

4. Since March 10, 1986, Conrail has required all employees covered by the Hours of Service Act to undergo post-accident toxicological testing as required by the regulations promulgated by the Federal Railroad Administration. Employees who are not covered by the Act are not required to undergo post-accident toxicological testing.

5. Since at least the time of its inception in 1976, Conrail has required all hourly employees, both those covered by the Hours of Service Act and those not covered by the Act, to undergo periodic physical examinations. These periodic examinations have routinely included a urinalysis. A drug screen was not routinely included as part of this urinalysis except as set forth in paragraph 7.

6. Since at least the time of its inception in 1976, Conrail has required all train and engine employees who have been out of service for at least thirty days due to furlough, leave, suspension or similar causes to undergo physical examinations upon returning to duty. In addition, since at least the time of its inception in 1976, Conrail has also required all other employees who have been out of service for at least ninety days due to furlough,

leave, suspension or similar causes to undergo physical examinations upon returning to duty. Return-to-duty physical examinations have routinely included a urinalysis. A drug screen was not routinely included as part of this urinalysis except as set forth in paragraph 7.

7. Since at least the time of its inception in 1976, Conrail has included a drug screen as part of the return-to-duty and periodic physical examination urinalyses of certain employees. With respect to return-to-duty physical examinations, a drug screen has been included as part of the urinalysis when the employee has been previously taken out of service for a drug-related problem, or when, in the judgment of the examining physician, the employee may have been using drugs. With respect to periodic physical examinations, a drug screen has been included as part of the urinalysis when, in the judgment of the examining physician, the employee may have been using drugs.

Respectfully submitted,

Of Counsel:

MORGAN, LEWIS & BOCKIUS

/s/ Joseph J. Costello
DENNIS J. MORIKAWA
JOSEPH J. COSTELLO
2000 One Logan Square
Philadelphia, PA 19103

HERMON M. WELLS
CONSOLIDATED RAIL CORPORATION
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/s/ Lawrence M. Mann
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Washington, D.C. 20001

Of Counsel:

ALPER, MANN & REISER

CORNELIUS O'BRIEN
1500 Market Street
Philadelphia, PA 19102

Attorneys for Plaintiff
Unions

Approved and So Ordered this 11th day of February, 1987.

/s/ A. Scirica
U.S.D.C.J.

COMMONWEALTH OF PENNSYLVANIA :
: ss.
COUNTY OF PHILADELPHIA :

AFFIDAVIT

I, F. J. Ilsemann, Jr., being duly sworn according to law, depose and say as follows:

1. I am employed by Consolidated Rail Corporation (hereinafter "Conrail") as Director of Health Services. In that capacity, I have overall responsibility for formulating medical standards applicable to Conrail employees and supervising the implementation of medical policies and procedures consistent with these medical standards. These medical standards include those applicable to the periodic, return-to-duty and follow-up physical examinations required of Conrail employees.

2. As a result of advances in medical science and medical technology, Conrail has periodically revised its medical standards. For example, for many years Conrail relied upon an examining physician's voice to conduct employee hearing tests. Conrail modified its procedures, however, to provide for the use of audiometers to conduct such tests. Similarly, Conrail now conducts spirometric examinations, measuring lung capacity, using computers rather than the calibrated bellows used in the past. Conrail has also revised its methods of conducting electrocardiograms and visual examinations based on advances in medical technology. These modifications have been made unilaterally without any consultation with Conrail's unions.

3. Conrail requires its employees to undergo several types of medical examinations including

periodic physicals, return-to-duty physicals and return-to-duty follow-up examinations. These examinations have been routinely conducted since at least the time of Conrail's inception in 1976. Descriptions of these examinations and the employees to whom they apply are set forth in Conrail's Medical Standards Manual. Relevant portions of the Medical Standards Manual are attached hereto as Attachment A.

4. Conrail requires employees to undergo periodic physical examinations every three years up to and including age fifty and every two years thereafter, with some exceptions as set forth in Attachment A. All periodic physical examinations have routinely included a urinalysis for blood sugar and albumin. A drug screen was also included as part of the periodic physical urinalysis when, in the judgment of the examining physician, the employee may have been using drugs. On April 1, 1984, Conrail issued a Medical Standards Manual, attached hereto as Attachment A, which provided that a drug screen would be included as part of all periodic physical urinalyses. For budgetary reasons, this policy was only applied in one of Conrail's regions, the Eastern Region, for a six month period and was then discontinued (Conrail's rail operations are divided into four regions: the Eastern Region, headquartered in Philadelphia; the Western Region, headquartered in Detroit; the Northeastern Region, headquartered in Selkirk, New York; and the Central Region, headquartered in Pittsburgh). Conrail then returned to its original policy of including drug screens as part of the periodic physical urinalysis only when, in the physician's judgment, the employee may have been using drugs. On February 20, 1987, however, Conrail announced that drug screens would be included as part of all periodic physical urinalyses.

5. With respect to return-to-duty physical examinations, such examinations have been required of all train and engine employees who have been out of service for at least thirty days due to furlough, leave, suspension, or similar causes. Other employees who have been out of service for at least ninety days are also required to undergo physical examinations upon returning to duty. These examinations have routinely included a urinalysis for blood sugar and albumin. In addition, a drug screen was originally included as part of the urinalysis when the employee had been previously taken out of service for a drug-related problem, or when, in the judgment of the examining physician, the employee may have been using drugs. When Conrail issued its Medical Standards Manual on April 1, 1984, the manual provided that drug screens would be included as part of all return-to-duty urinalyses. As with periodic physical examinations, this policy was only applied to Conrail's Eastern Region for a six-month period. Conrail thereafter returned to its original policy of requiring a drug screen only when the employee had been previously taken out of service for a drug-related problem, or when, in the judgment of the physician, the employee may have been using drugs. On February 20, 1987, however, Conrail also announced that a drug screen would be included as part of all return-to-duty urinalyses.

6. With respect to return-to-duty follow-up examinations, also known as periodic-special examinations, Conrail's Department of Health Services has been responsible for determining whether an employee's condition justified requiring follow-up examinations to evaluate the employee's continuing fitness to work after he or she has returned to duty. Such follow-up examinations have, for example, been required of employees who have suffered heart

attacks, or have been diagnosed as having hypertension or epilepsy. On February 20, 1987, Conrail announced that its follow-up examination policy would also apply to employees who return to duty from being disqualified for any reason associated with drug use.

7. Since at least the time of its inception in 1976, Conrail has required that any employee who undergoes a periodic, return-to-duty or follow-up physical examination and who fails to meet Conrail's established medical standards may be held out of service without pay until the condition is corrected or eliminated. Thus, for example, employees have been held out of service until their vision can be corrected or their blood pressure reduced to meet medical standards. Employees have also been held out of service if their blood sugar, as revealed by urinalysis, is too high. Employees who fail to meet Conrail's medical standards by testing positive for illegal drugs will not be returned to service unless they can provide a negative drug test within forty-five days from a medical facility to which the employee is referred by Conrail's Medical Director. This forty-five day period begins on the date of the letter notifying the employee that he or she is being withheld from service. An employee whose first test is positive is given the opportunity for an evaluation by Conrail's Employee Counseling Service. If the evaluation reveals an addiction problem and the employee agrees to enter an approved treatment program, the employee will be given an extended period of 125 days to provide a negative drug test.

8. Conrail also requires job applicants to submit to a drug screen as part of the urinalysis which is required of all applicants during pre-employment physicals. These drug screens are also part of the

physical examinations required of Conrail's executives. Conrail does not, however, conduct "reasonable suspicion" testing of its employees as authorized by the Federal Railroad Administration's regulations entitled "Control of Alcohol and Drug Use in Railroad Operations."

9. The foregoing facts are true and correct and based upon my personal knowledge, and knowledge obtained by me in the course of the performance of my duties as Director of Health Services.

/s/ F. J. Ilsemann, Jr.
F. J. Ilsemann, Jr.

Sworn to me and subscribed before me this 6th day of March, 1987.

/s/ Alfonso J. DiGregorio
Notary Public

ALFONSO J. DiGREGORIO
Notary Public, Philadelphia, Philadelphia Co.
My Commission Expires September 24, 1988

IV. DESCRIPTION OF MEDICAL EXAMINATIONS

PRE-EMPLOYMENT

Who: All job applicants

Content: Full medical history

Complete physical examination including funduscopic, blood pressure, pulse, temperature, height and weight

Routine urinalysis, including a screen for the use of controlled substances

Visual examination for near and distant vision, uncorrected and corrected

Color vision evaluation

Hearing examination, including baseline audiogram

Spirometry

Base line EKG for all Class A applicants

Frequency: At the time of employment

Forms used: MD-40 and MD-1

PERIODIC-REGULAR

Who: All employees as listed in frequency schedule below

Content: Full medical history

Complete physical examination including funduscopic, blood pressure, pulse, temperature, height and weight

Routine urinalysis, including a screen for the use of controlled substances

Visual examination for near and distant vision, uncorrected and corrected

Color vision evaluation

Hearing examination if employee is subject to the Hearing Conservation Program

Spirometry

EKG required only on Locomotive Engineers, Hostlers or Firemen

Frequency: Positions listed below require periodic examinations every three years up to and including age 50 and every two years thereafter, with exceptions noted:

Train and Engine Service Employees (Locomotive Engineer, Fireman, Hostler, Conductor, Brakeman, Flagman, Switchtender)
Exception: State of New Jersey requires annual periodic examination of Locomotive Engineers

Road Foreman of Engines

Trainmaster

Block Operator, Towerman, Leverman

Crane or Derrick Operator, Machine Operator (Class 1 and 2)

Operator of Over-the-Highway Vehicles
Exception: Operator of Over-the-Highway Vehicles require periodic examination every two years

Police Officer

Inspection and Repair Foreman

Employee engaged in preparation/serving food. Exception: must be examined annually

Train Dispatcher

Any non-agreement employee who works around heavy moving equipment Exception: Division Superintendents must be examined annually

Supervisory positions in Systems Operations Bureau Exception: Must be examined annually

Forms used: MD-40 and MD-2D

PERIODIC-SPECIAL

Who: In-service employees requiring re-evaluation of an existing condition as initiated by examining physician.

Content: Medical re-evaluation of pre-existing condition after appropriate interval set by examining physician at initial examination.

Frequency: As established by examining physician (e.g. 1 month, 3 months, etc.)

Forms used: MD-40 and MD-2D or MD-2C.

RETURN FROM FURLOUGH, LEAVE, SUSPENSION OR SIMILAR CAUSES

Who: Employees who are returning to service after an absence for other than disability reasons.

Content: Full medical history

Complete physical examination, including funduscopic blood pressure, pulse, temperature, height and weight

Routine urinalysis, including a screen for the use of controlled substances

Visual examination for near and distant vision, uncorrected and corrected

Color vision evaluation

Hearing examination if employee is subject to the Hearing Conservation Program

Spirometry

EKG, required only on Locomotive Engineers, Hostlers or Firemen.

Frequency: Required of Train and Engine Service employees after 30 days absence

Required of all employees, other than Train and Engine Service, absent more than 90 days

Forms used: MD-40 and MD-2D or MD-2C

DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION

IN RE:
CONTROL OF ALCOHOL AND DRUG USE IN RAILROAD OPERATION ADVANCE NOTICE OF PROPOSED RULEMAKING
Docket No. RSOR-6

The above entitled matter came on for hearing on September 1 and 2, 1983, at the Department of Transportation, 7th & C Streets, S.W., Room 2230, Washington, D.C.

BEFORE PANEL MEMBER:
THOMAS A TILL, Chairman, Deputy Administrator
JOHN M. MASON, Chief Counsel
JOSEPH W. WALSH, Associate Administrator for Safety
WALTER ROCKEY, Special Assistant to Associate Administrator to Safety
GRADY C. COTHEN, Esquire

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be doing later on when he's in a much larger and more dangerous vehicle, in other words he has a great deal more responsibility for the public at one time.

MR. TILL: Are there any questions from the audience? If not, thank you very much for your testimony and your appearance here today and for the information that you provided.

MS. NATHANSON: Thank you.

MR. TILL: The next witness is Mr. Don Swanson, the Vice President of Operations of Consolidated Rail Corporation, accompanied by a panel.

MR. SWANSON: Thank you, Mr. Chairman, members of the panel. I'm Donald Swanson, Vice President – Transportation of the Consolidated Rail Corporation.

Accompanying me are Mr. Herman Wells, our legal representative and John Gorman, our Manager of Employee Assistance.

On behalf of Conrail, I want to express appreciation for this opportunity to contribute information and views for resolving the problem of alcohol and drug use in the railroad industry.

My own department has a major part of the responsibility for promoting safety by working.

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MR. MASON: You mean mandatory by FRA?

MR. WELLS: What we intended to convey was that we would like to have authority to use those breathalyzers to test when we thought there was a reason to test or maybe even occasionally for spot checks. But we would not like a requirement by the FRA that we should use them in all cases.

MR. MASON: In principle then, you do not think that occasional random use of the breath testing device – assuming the proper safeguards – is in and of itself warranted –

MR. WELLS: No, it would be useful deterrent.

MR. MASON: But to clear that up, do you believe that at some point unregulated, overzealous use of a testing device on a random basis could reach a level of operation that would be inappropriate?

MR. WELLS: It might.

MR. MASON: Thank you, that's all I have.

MR. TILL: Are there any further questions from the audience? Mr. Cothen?

MR. COTHEN: Does Conrail require any annual physicals?

MR. SWANSON: Yes, it does.

MR. COTHEN: Are they performed by private physicians?

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MR. SWANSON: In some cases – well, they're performed in some cases by private physicians under contract with Conrail.

MR. COTHEN: Are the physicians asked to do a drug screen of –

MR. SWANSON: No, they are not.

MR. COTHEN: Have you considered it?

MR. SWANSON: Not that I'm aware of.

MR. COTHEN: Would it present any – obstacles?

MR. SWANSON: Not to my knowledge, no.

MR. TILL: Thank you, Mr. Swanson.

The next witness is Mr. William Johnston of the Association of American Railroads, accompanied by Mr. Holiis Duensing.

MR. DUENSING: Mr. Till, I apologize for not having extra statements of Mr. Johnston here with us today.

As you know, we were scheduled to appear tomorrow and in view of previous comments that you – indicating that you'd like to hear us today, we must proceed on the basis of our draft statement. And I have an extra copy which I can either give to the panel or to the reporter, whichever you wish.

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DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION

IN RE:
CONTROL OF ALCOHOL AND DRUG USE IN RAILROAD OPERATION ADVANCE NOTICE OF PROPOSED RULEMAKING
Docket No. RSOR-6

The above entitled matter came on for hearing on September 1 and 2, 1983, at the Department of Transportation, 7th and C Streets, S.W., Room 2230, Washington, D.C.

BEFORE PANEL MEMBER:
THOMAS A. TILL, Chairman, Deputy Administrator
JOHN M. MASON, Chief Counsel
JOSEPH W. WALSH, Associate Administrator for Safety
WALTER ROCKEY, Special Assistant to Associate Administrator to Safety
GRADY C. COTHEN, Esquire

BEFORE THE
UNITED STATES
DEPARTMENT OF TRANSPORTATION
FEDERAL RAILROAD ADMINISTRATION

CONTROL OF ALCOHOL AND DRUG
ABUSE IN RAILROAD OPERATIONS
FRA DOCKET NO. RSOR-6, NOTICE NO. 1

COMMENTS OF THE ASSOCIATION
OF AMERICAN RAILROADS

My name is A. William Johnston, Vice President, Operations and Maintenance Department, Association of American Railroads.

The nation's railroads are committed to the strong and effective enforcement of the existing prohibitions against the use of alcohol and drugs and the possibility of employees performing duties when under the influence of alcohol or drugs. Both management and labor have devoted substantial resources in attacking this issue within each railroad. Unfortunately, public perception of the railroad's success in enforcing its regulations is formed by nonrailroad sources. Public attention to the issue of drug and alcohol abuse enforcement is beneficial to the extent it motivates reasonable private and public action but detrimental to the extent it creates the impression that nothing is being done or that railroads are lax in enforcing their rules.

• • •

person's sense of fairness and reasonableness nor is there any outcry against such public use as being an unreasonable invasion of the motorist's right to privacy. In the case of railroad employees engaged in duties directly affecting public safety, the issue is not an

abstract matter of the right to privacy — it is a question of public safety. *Railroad employees do not have a right to privacy which rises above public interest in safety.*

The railroads should be free to use state-of-the-art testing devices on a selective basis. A railroad should have the ability to expend its resources in an efficient manner and thus could pinpoint specific problem locations on an unannounced spot basis. Unless the railroad has the ability to set the criteria for use of such devices it may be deprived of the ability to use the devices in a manner which effectively deters Rule G violations. *Because of existing grievance procedures, there is very little chance that tests will be administered in an unreasonable manner.*

Importantly, it is essential that *the breath analysis tests and similar tests be used and viewed as merely supplemental to existing methods of enforcing Rule G.* The traditional methods of determining Rule G violations — incoherent speech, slurring, unsteady gait, smell of alcohol, etc. — will still be relied upon and serve as the basis for disciplinary action for Rule G violations.

• • •

In addition to using state-of-the-art testing devices on a controlled random basis, the railroads will be free to use them in

• • •

FORM L
NATIONAL RAILROAD ADJUSTMENT BOARD
FIRST DIVISION

With Referee Robert M. O'Brien

Award 23334
Docket 43260

PARTIES TO DISPUTE (Brotherhood of Locomotive Engineers
(Southern Pacific Transportation Company (Pacific Lines)

STATEMENT OF CLAIM: "Where the agreements and past practices in effect between the General Committees of Adjustment, Brotherhood of Locomotive Engineers, on the Southern Pacific Transportation Company (Pacific Lines and former Pacific Electric) and the carrier do not provide for the mechanical or chemical testing of its employees to determine whether they are under the influence of intoxicants or for the disciplining of any employee refusing to accede to such testing or registering any positive reading on the testing device, may the Southern Pacific Transportation Company unilaterally establish and engage in an Intoxilyzer Program by which it indiscriminately and without probable cause compels its locomotive engineers to submit to breath tests in order to determine their blood alcohol content and disciplines any employee refusing to submit to such testing or having a positive reading of any degree whatsoever?"

FINDINGS: The First Division of the National Railroad Adjustment Board, upon the whole record and all the evidence, finds that the parties herein are carrier and employee within the meaning of the Railway Labor Act, as amended, and that this Division has jurisdiction.

Hearing was held.

STATEMENT OF THE CASE

On January 15, 1980, the Southern Pacific Transportation Company (hereinafter referred to as the Carrier) forwarded to all General Chairmen who represented employees on its Pacific Lines an advance copy of two articles which were scheduled to appear in Carrier's house organ, the Southern Pacific Bulletin, in January, 1980. The articles explained how the Carrier intended to address the trouble it was experiencing with employees who had alcohol related problems. The article went on to state that the Company intended to spot check employees, particularly those who operate moving equipment, with a devise [device] referred to as an "Intoxilyzer." The Intoxilyzer, according to the article, measures the concentration of alcohol in one's bloodstream through analysis of a breath sample.

The Carrier advised its General Chairman that the Intoxilyzer would be demonstrated throughout the system on a random basis. At each location all employees would be notified in advance of the demonstration. While employees would be required to blow into the Intoxilyzer, Carrier made it clear that no disciplinary action would be taken during the demonstration period.

Eight months later, by letter dated September 16, 1980, the Carrier notified its Union representatives that the demonstration period had ended and henceforth its Intoxilyzer program would be placed in effect. As will be explained hereinafter, this program required *all* employees who were either going on duty or who were already on duty to subject themselves to Intoxilyzer testing.

On September 26, 1980, employees represented by the Brotherhood of Locomotive Engineers (hereinafter referred to as the Organization) commenced a strike on Carrier's Western Lines claiming that Carrier's unilateral implementation of its Intoxilyzer program violated the Railway Labor Act. On November 14, 1980, the

United States District Court for the Northern District of California issued a preliminary injunction enjoining the employees from striking the Carrier. The Court rule, *inter alia*, that Carrier's enforcement and use of Intoxilyzer testing constituted a "minor dispute" under the Railway Labor Act. The Court issued a further Order which provided, in pertinent part, as follows:

> "IT IS FURTHER ORDERED that, until such time as the National Railroad Adjustment Board has rendered a final decision on the uses of the Intoxilyzer, the plaintiff railroad shall either (1) refrain from discharging any employee engineer covered by the agreement between the plaintiff and defendant union for insubordination based upon an employee's refusal to submit to Intoxilyzer testing, or for a violation of Rule G, or other rule, proof of which is based upon the use of Intoxilyzer test results or (2) pay any said employee so discharged the wages that he or she would have received, until such time as the Board renders its final decision."

Pursuant to the Decision and Order of the United States District Court for the Northern District of California, the First Division of the National Railroad Adjustment Board (hereinafter referred to as the Board) convened a hearing on June 25, 1981. At that hearing, voluminous evidence and arguments were proffered to the Board by the Organization and by the Carrier. Following a careful analysis of that extensive evidence, this Board renders the following Findings and Award.

STATEMENT OF THE ISSUE

It is unfortunate that neither the Court's Opinion nor its Order succinctly framed the issue to be decided by this Board. The Court simply ruled that the dispute was a "minor dispute" under the Railway Labor Act and must therefore be decided by the National Railroad Adjustment Board. Its Order declared that the Board shall render "a final decision on the uses of the Intoxilyzer."

This lack of precision is exacerbated by the failure of either the Organization or the Carrier to frame an objective statement of the issue to be adjudicated.

Accordingly, it is the view of this Board that the following accurately reflects the question to be decided herein:

> Did the Intoxilyzer program implemented by the Carrier by Special Notice No. 64 dated September 22, 1980, violate the collective bargaining agreement in effect between the Brotherhood of Locomotive Engineers and the Southern Pacific Transportation Company?
>
> If so, what shall be the remedy?

BACKGROUND

In June, 1973, a serious accident occurred when one of Carrier's trains collided with the rear of another train which had stopped at Indio to change crews. An Engineer and a Head Brakeman were killed in the collision. The National Transportation Safety Board investigated the collision and concluded that the Engineer of one of the trains was under the influence of alcohol and that this was the direct cause of the collision.

On July 24, 1979, another rear-end collision occurred between two Southern Pacific Transportation Company trains at Thousand Palms, California. The

Engineer of one of the trains died following the collision as a result of smoke and fire. Moreover, four crew members were injured and damage was estimated by the Carrier at $1.5 million. The National Transportation Safety Board investigated this collision. An analysis of the Engineer's urine revealed a blood-alcohol level of 0.18%. The National Transportation Safety Board reiterated an earlier recommendation it had made to the Carrier in 1974 to "Establish more effective procedures to insure that employee's [sic] comply with the Operating Rules such as by requiring that conductors examine crew members coming on duty to ascertain their apparent physical competence to perform their responsibilities."

In November, 1979, Carrier purchased an Intoxilyzer machine. The Intoxilyzer is an electronic device developed by CMI, Inc. which measures the blood-alcohol concentration (hereinafter referred to as BAC) through an analysis of one's breath sample. The model purchased by the Carrier was Model #4011AS.

As observed heretofore, in January, 1980, the Carrier advised its Unions, including the Brotherhood of Locomotive Engineers, that it intended to demonstrate the use of the Intoxilyzer on major on and off-duty points during a ninety-day familiarization period. On September 16, 1980, Carrier informed its Unions that the demonstration period had ended and that all employees would be subject to compulsory intoxilyzer testing. On or about September 22, 1980, the Carrier issued Special Notice No. 64 advising Trainmen, Enginemen and Yardmen that the Intoxilyzer program is now in effect. Special Notice No. 64 provided, in its entirety, as follows:

SPECIAL NOTICE NO. 64

TRAINMEN, ENGINEMEN AND YARDMEN

As you are aware, in our January 1980 Bulletin, information was distributed to all Southern Pacific employees about the need for a program to provide employes with a working environment where employe safety is not threatened by the use of alcohol by any employe while working or while subject to duty.

Demonstration of the Intoxilyzer, also as described in the Bulletin Article, has provided a widespread exposure of the device and its operation to employes. In general, cooperation during demonstration has been excellent and the display of employe interest in the safety objectives of the program is appreciated.

The Intoxilyzer demonstration period has now ended and a program involving use of Intoxilyzer has been developed for immediate implementation. The program is as follows and is now in effect.

1. All employes going on or while on duty will be subject to Intoxilyzer testing.

2. Upon going on duty –

a. Any registration or refusal to blow into the Intoxilyzer will result in employe not being allowed to assume duty.

b. Registration of .10 percent or more will also result in employe being taken out of service and charged with violation of Rule G.

3. Except as provided in Item 2(a) above, any registration while on duty will result in employe being taken out of service and charged with violation of Rule G.

4. Any employe causing a registration on the Intoxilyzer will be tested twice, the second time after a 15-minute interval to validate the reading.

5. Each employe will be given a copy of the Intoxilyzer printout. Copies will also be retained by the division and a copy will be placed on the employe's personal record file if a registration occurs.

Use of Intoxilyzer is in addition to the established procedures for dealing with Rule G.

We again solicit the cooperation of the employes and Unions representatives in the application of this program which is aimed simply at eliminating alcohol abuse affecting the safety of employes, the public, and railroad operations.

M. D. Ongerth
Superintendent

It was Carrier's unilateral implementation of this program that caused employees represented by the Brotherhood of Locomotive Engineers to commence a strike on September 26, 1980. Again, as observed, *supra,* the United States District Court for the Northern District of California enjoined that strike and referred the dispute between the parties respecting the Intoxilyzer program to this Board.

ORGANIZATION'S POSITION

Throughout this controversy, the Organization has claimed that the Railway Labor Act; the collective bargaining agreement; and past practice all proscribed the Carrier from unilaterally promulgating the Intoxilyzer program. According to the Organization, the use of alcoholic beverages, intoxicants, or narcotics by employees subject to duty or their possession, use, or employees' being under the influence of alcohol while on

duty or on Company property has always been prohibited. This prohibition is contained in Rule G of Carrier's Rules and Regulations of the Transportation Department.

The Organization argues, however, that Rule G does not refer to breath testing, nor does it grant the Carrier the authority to compel employees to subject themselves to any mechanical or chemical testing device to determine their blood-alcohol content. The Organization emphasizes that Rule G does not grant Carrier the authority to compel mechanical or chemical tests, nor does it allow it to discharge employees for refusing to take such a test.

The Organization submits that the Carrier has conceded that as a matter of long-standing practice, the evidence it has relied on in alcohol abuse cases under Rule G has been essentially based on visual observation, surmise, and circumstantial suspicion; viz, flushed face, thick voice, slurred words, and other relevant outward physical manifestations. This, in the Organization's judgment, constitutes an admission by the Carrier that under the previous longstanding past practice, there must be probable cause from observation or from some outward physical manifestation before an employee could be charged with violating Rule G. The Intoxilyzer program contains no element of probable cause, however. The Organization avers that the collective bargaining agreement, and the past practice on this property, do not allow the Carrier to unilaterally implement the systematic and indiscriminate breath testing of employees, nor do they allow the Carrier to discipline any employee for refusing to engage in such a breath test. Absent such authority, it is the opinion of the Organization that the Carrier had no right to unilaterally implement the Intoxilyzer program on or about September 22, 1980.

The Organization further asserts that the Intoxilyzer program is improper due to the criterial unilaterally established by the Carrier to determine the conditions under which one is determined "under the influence of alcoholic beverages." For instance, under the program, alcohol content of .01 percent is sufficient to constitute being under the influence. Moreover, according to the Organization, the Intoxilyzer machine used by the Carrier is neither reliable nor accurate. The Organization stresses that according to CMI, Inc., the corporation which manufactures the Intoxilyzer, the machine's margin of error is ±.01. Accordingly, the Intoxilyzer may register the presence of alcohol in one's bloodstream even though that individual had absolutely no alcohol in his/her bloodstream. The Intoxilyzer is also unreliable, in the Organization's judgment, since it lacks the ability to detect ethyl alcohol in one's body to the exclusion of all other substances. Thus, one who has consumed food such as rum cake or lemon drops, or who has acetone on his breath, may register a positive reading on the Intoxilyzer even though he has consumed absolutely no alcohol. Indeed, the Organization emphasizes that a Court in Ohio has ruled that the Intoxilyzer breath-testing device is simply unable to accurately determine how much alcohol is in the human bloodstream. The Ohio Court found the Intoxilyzer machine unreliable, and not based on reliable scientific principles, inasmuch as there were many variations within a human body that were not taken into account by the Intoxilyzer machine. It is the Organization's contention that employees should not be deprived of their seniority rights based on such unreliable test results.

The Organization further argues that when the Carrier unilaterally abolished the well-established working conditions applicable to the engine service employees when it removed the probable cause aspect of Rule G

and changed the method by which the Rule was administered, Carrier violated not only the collective bargaining agreement and the past practice that had been [in] effect on this property for over 50 years, but it also contravened the Railway Labor Act. It avers that when Carrier required its Engineers to involuntarily submit to breath tests and punished them for refusing to do so, Carrier thereby violated Section 2, Seventh, and Section 6 of the Railway Labor Act.

It is further the contention of the Organization that the Intoxilyzer program, as designed and administered by the Carrier, transgresses a number of individual and constitutional rights guaranteed all individuals. For example, according to the Organization, this program violated the Fourth Amendment to the United States Constitution since its use was clearly an unreasonable search and seizure. The program as administered by the Carrier, the Organization stresses, did not require a threshold determination of probable cause to believe that the individual who was required to take the Intoxilyzer test indeed had alcohol in his/her blood. The Organization submits that alternatives were available to the Carrier that would not intrude on Engineers' constitutional and personal rights.

The Organization also asserts that the Intoxilyzer program was contrary to the right of privacy guaranteed all residents of California by Article 1, Section 1 of the California Constitution. The Organization submits that use of the Intoxilyzer is precisely the type of surveillance prohibited by Article 1, Section 1 of the California Constitution; and constitutes an overbroad collection of data without the presence of probable cause which again is proscribed by the California Constitution.

The Organization further claims that use of the Intoxilyzer by the Carrier was contrary to the principles enunciated by the Supreme Court of the United States

in the landmark case of *N.L.R.B. v Weingarten, Inc.*, 420 US 251. According to the Organization, employees who are required to submit to compulsory Intoxilyzer testing are denied the right to Union representation guaranteed by the Supreme Court in *Weingarten*. Interference with employees' personal, constitutional, and legal rights would, standing alone, render the Carrier's Intoxilyzer program impermissible, according to the Organization. When these impingements are considered in the light of the long-standing past practice wxtant [sic] on this property, the Organization asserts that it becomes manifestly clear that the Carrier lacked authority to establish a compulsory mechanical or chemical testing program such as it promulated [promulgated] in September, 1980.

CARRIER'S POSITION

The Carrier insists that the Intoxilyzer program is merely a more effective and objective method of enforcing the spirit and intent of Rule G. Its implementation and use clearly did not involve a change in rules or working conditions, and the United States District Court for the Northern District of California so ruled. The Carrier maintains that it has assumed a high degree of responsibility for the safety of its employees as well as for the safety of the public. Use of the Intoxilyzer machine was merely one means of carrying out this responsibility, the Carrier asserts.

The Carrier claims that for over 50 years all Railroads in the United States have detected the use of alcohol on the part of their employees by their outward physical manifestations. It insists that the Intoxilyzer is merely an advanced methodology used to test employees' sobriety. It is no different in principal from traditional methods of observation previously employed by Railroads, the Carrier asserts. The Intoxilyzer is a method of observation, not a determination in itself, in

the Carrier's judgment. It is simply an additional method of observation; is more objective than previous methods of observation; and is quite accurate. Indeed, the Intoxilyzer machine was found to be extremely accurate by the United States Department of Transportation. The Carrier insists that the Organization's assertion that the Intoxilyzer machine is unreliable and inaccurate is simply not borne out by the evidence at hand. The Carrier further maintains that it has always been its prerogative to test employees for intoxication. Use of the Intoxilyzer, in the Carrier's judgment, is merely a modern method of measuring alcohol used in conjunction with visual observation as part of its on-going program to insure the safety of its employees and the safety of the public. Neither the contract nor past practice specifically precluded the Carrier from detecting intoxication by use of the Intoxilyzer machine, the Carrier asserts.

The Carrier emphatically denies the Organization's contention that probable cause has always been required before the Carrier was allowed to charge an employee with violating Rule G. It insists that this Carrier, and the railroad industry in general, have always tested for Operating Rule compliance without probable cause being established.

According to the Carrier, this Board clearly has no jurisdiction to consider the applicability of State or Federal Law to this dispute. The contract in effect between the parties does not incorporate external laws. It has been well established, in the Carrier's view, that this Board has no jurisdiction to interpret State or Federal law. Thus, the Organization's contention that the Intoxilyzer program violates the Railway Labor Act; the California Constitution; and the United States Constitution, is simply a matter beyond the authority of this Board.

Notwithstanding the fact that this Board lacks jurisdiction to interpret State and/or Federal law, nevertheless, the Carrier asserts, the State and Federal law cited by the Organization in support of its argument is simply misplaced. For instance, Carrier avers that the Railway Labor Act was clearly not violated inasmuch as the United States District Court for the Northern District of California ruled that the Intoxilyzer program did not constitute a change in rules or working conditions. The Court stressed that engineers on this property always faced the possibility of discharge for violation of Rule G. Nor was the Fourth Amendment of the United States Constitution applicable to the Intoxilyzer program, Carrier states, since the Federal Constitution only prohibits unreasonable searches and seizures conducted by governmental entities. It does not create a general right of privacy, however. Moreover, the cited provisions of the California Constitution are not germane to this dispute since they were never intended to encompass bodily searches. Rather, they were intended to eliminate the unnecessary dissemination of personal information, a subject clearly not involved herein.

Finally, the Carrier insists that the decision of the United States Supreme Court in *N.L.R.B. v. Weingarten, Inc.* is inapposite to this proceeding since there the Supreme Court interpreted the National Labor Relations Act, not the Railway Labor Act. The principles enunciated in *Weingarten,* even were they germane to the circumstances prevalent here, have no application to the railroad industry, the Carrier emphasizes.

The Carrier insists that all Divisions of the National Railroad Adjustment Board have consistently ruled that railroads not only have the right, but indeed the duty, to take all precautions, and to establish rules and standards for the protection of its employees and the public. Unless restricted by the terms of the parties' collective bargaining agreement, the Carrier submits that it retained the

right to discharge this responsibility by instituting the Intoxilyzer program in September, 1980. It avers that it is not necessary that a contractual provision exist granting it this right, as the organization contends. Rather, the burden rests with the Organization to demonstrate that a specific rule bars implementation and use of the Intoxilyzer. The Carrier insists that the Organization has cited no such rule which precluded it from utilizing the Intoxilyzer machine as a method to assure its employees' sobriety. Its use of Intoxilyzer testing did not violate the collective bargaining agreement; past practice; or any Federal or State law, the Carrier asserts. Rather, its use and implementation was consistent with its duty to do everything possible to guarantee the safety of its employees and that of the public. For these reasons, its implementation and use of the Intoxilyzer must be upheld by this Board.

FINDINGS

The record before us clearly evidences that the parties' written agreement neither specifically allows nor specifically proscribes the use of mechanical or chemical testing to determine whether Carrier's employees are under the influence of alcohol. Yet, it is now well established that bargaining relationships encompasses significantly more than the express written terms of collective bargaining agreements. Indeed, it has been decided repeatedly – both by Arbitrators and by Courts of Law – that custom and practice may, under some circumstances, attain the status of contractual rights and obligations. Thus, past practice may be just as much a part of one's contract as the written terms thereof.

On at least two occasions, the Supreme Court of the United States has had occasion to address this precise question of custom and past practice. In *United Steelworkers of America v. Warrior and Gulf Navigation Company,* 80 S.Ct. 1347, 1351, the Court declared that:

"The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern the myriad of cases which the draftsmen cannot wholly anticipate . . . the collective agreement covers the whole employment relationship. It calls into being a new common law — the common law of a particular industry or of a particular plant."

The Court went on to cite with approval, the observations offered by a seasoned labor arbitrator (*Cox, Reflections Upon Labor Arbitration*, 72 Harvard Law Review 1482). Quoting *Cox* the Court stated:

". . . There are too many people, too many problems, too many unforceable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words."

The Court proceeded to clearly rule that the labor arbitrator's source of law is not contained in the express provisions of the contract. It declared that:

"The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law — the practice of the industry and the shop — is equally a part of the collective bargaining agreement although not expressed in it."

The Supreme Court in a later decision involving the Railway Labor Act reiterated the findings it forged in *Warrior and Gulf*. Although *Detroit and Toledo Shore*

Line Railroad Company v. The United Transportation Union, 396 US 142, addressed settlement of the Railway Labor Act, nevertheless the Court's reasoning is equally applicable to disputes under Section 3 of the Act, in our judgment. The Court in *Detroit and Toledo Shore Line* stressed the following:

"The obligation of both parties during a period in which any of these status quo provisions (Section 6 of the Railway Labor Act) is properly invoked as to preserve and maintain unchanged those actual, objective working conditions and practices, broadly conceived, which were in effect prior to the time the pending dispute arose and which are involved in or related to that dispute.

"It is quite apparent that under our interpretation of the status quo requirement, the argument advanced by the Shore Line had little merit. The railroad contends that a party is bound to preserve the status quo and only those working conditions covered in the parties' existing collective agreement, but nothing in the status quo provisions of Sections 5, 6 or 10 suggests this restriction. We have stressed that the status quo extends to those actual, objective working conditions out of which the dispute arose, and clearly these conditions need not be covered in an existing agreement. Thus, the mere fact that the collective agreement before us does not expressly permit outlying assignments would not have barred the railroad from ordering the assignments that gave rise to the present dispute if, apart from the agreement, such assignments had occurred for a sufficient period of time with the knowledge and acquiescence of the employees to become in reality a part of the actual working conditions."

The Court reiterated its findings in *Warrior and Gulf* when it stated:

"It would be virtually impossible to include all working conditions in a collective-bargaining agreement. Where a condition is satisfactorily tolerable to both sides, it is often omitted from the agreement, and it has been suggested that this practice is more frequent in the railroad industry than in most others."

What is obvious from the foregoing pronouncements is that in industry in general, and in the railroad industry in particular, there is more to parties' contractual relationships than the express written terms of their collective bargaining agreements. The authority of this Board is clearly not confined to the express provisions of the parties' contract. Rather, practices prevailing in this industry, and practices extant on this particular Carrier, are equally a part of the collective bargaining agreement although not expressed therein. Accordingly, if a past practice was shown to exist that either allowed or proscribed Carrier's use of the Intoxilyzer machine, then that practice must be given effect by this Board, notwithstanding the absence of an express term of the agreement addressing this precise subject.

The standards for determining under what circumstances an unwritten practice will be held binding as an implied condition of employment are admittedly imprecise. However, that dilemma is not present in this particular dispute. The parties readily concede that at least for the past 50 years, the practice on this property has always been that evidence of intoxication was based on visual observation; surmise; and other outward physical manifestations, such as a flushed face, slurred speech, unsteady gait, glassy eyes, etc. Indeed, the Carrier has readily agreed that this had always been the sole means it employed for determining whether its employees were under the influence of alcohol. Carrier further agrees that prior to institution of the Intoxilyzer program in September, 1980, it has never required its

employees to submit to any mechanical or chemical device to test their blood-alcohol levels.

In light of this admission by the Carrier, it is manifestly clear that for the past 50 years, both the Organization and the Carrier have acquiesced in the visual observation of employees, and their outward physical manifestations, as the method for determining whether employees were under the influence of alcohol and thereby in violation of Rule G. Based on this Board's experience, it is our firm belief that this method for determining intoxication has prevailed not only on this property, but throughout the entire railroad industry for a considerable period of time.

In the light of the foregoing, the central question that must be addressed by this Board is whether Carrier possessed the right to unilaterally abrogate this well-enunciated, long-standing practice by implementing its Intoxilyzer program on or about September 22, 1980? For the reasons expressed hereinafter, this Board finds that Carrier had no authority to unilaterally abrogate this practice.

Initially, this Board must take exception to the Carrier's claim that the United States District Court for the Northern District of California ruled that Carrier's use of the Intoxilyzer did not constitute a change in rules or working conditions. Were that the Court's decision, there would be no question for this Board to address. Obviously, the crucial issue involved in the proceeding before the United States District Court (No. C-80-3753-WAI) was strictly a jurisdictional one. When that Court ruled that the dispute before it constituted a "minor dispute" under the Railway Labor Act, it deferred resolution of that minor dispute to this Board. Implicit in its referral was the Court's acknowledgment that it shall be our authority, at least in the first instance, to determine whether the controlling agreement proscribed use

of the Intoxilyzer program. This Board has carefully reviewed the record in that Court proceeding. There is simply no evidence in that record that the custom and practice on this property, or that the custom and practice prevalent in the railroad industry, were issues addressed by the Court when it considered the Carrier's motion for a preliminary injunction. Accordingly, in our view, the question of whether Carrier's implementation of its Intoxilyzer program constituted an impermissible change in the bargaining relationship between the parties was a question referred to this Board for adjudication. The Court's decision that there was no change in rules or working conditions, as those terms are used in Section 6 of the Railway Labor Act, was not binding on this Board which, of course, has jurisdiction only over those disputes arising under Section 3 of the Act. Consequently, the Court's pronouncement relied on by the Carrier herein does not bar us from deciding whether Carrier's implementation of the Intoxilyzer program was contrary to the prior custom and practice on this property.

The Carrier's argument that its use of the Intoxilyzer is no different in principle from traditional methods of observation under Rule G is simply not borne out by the record. Under Rule G, traits exhibited by an employee, such as an unsteady gait, flushed face, slurred speech, etc., provided the sole basis upon which the Carrier formed its belief that said employee was under the influence of alcohol. Based on these outward physical manifestations which were observed by the Carrier, that employee would then be charged with violating Rule G. However, under the Intoxilyzer program, no reason to suspect that an employee was under the influence of alcohol was even remotely involved. Rather, the program shifted the burden to all employees, those coming on duty as well as those already on duty, to satisfy the Carrier that they had not consumed alcohol.

That the Intoxilyzer is administered randomly and indiscriminately, and is compulsory on all employees regardless of whether Carrier has any reason to suspect them of consuming alcohol is acknowledged by the Carrier. The program as currently administered compels all employees to undertake affirmative conduct to demonstrate that they have no blood-alcohol in their body. That no parallel exists between this compulsory, random, and indiscriminate program; and that erstwhile method of observation used by the Carrier to detect intoxication is patently obvious to this Board.

Whether the Intoxilyzer itself is a determination of intoxication, as the Organization claims, or merely an additional method of observation, as the Carrier asserts, is not a crucial distinction in our view. Even assuming that the Intoxilyzer merely constitutes an additional method of observation – and this Board is by no means convinced of this – nevertheless the Intoxilyzer test is such a marked departure from previous methods of detection under Rule G that it clearly constitutes a change in the prior custom and practice used to detect intoxication on this property. Moreover, even were it shown that the Intoxilyzer is a more effective and objective method of enforcing the spirit and intent of Rule G as Carrier asserts, nevertheless it still constitutes a marked departure from the prior method used by Carrier to detect one's use of alcohol while either on duty or subject to duty.

In sum, the evidence convinces this Board that there is scant similarity between the former method of detecting use of alcohol by employees under Rule G, and the use of Intoxilyzer testing to make this determination. The Carrier obviously departed from the prior well-established practice, which practice was mutually accepted by the parties over a period in excess of 50 years, when it unilaterally implemented the Intoxilyzer program in September, 1980.

This Board wishes to make it manifestly clear that our decision here is predicated solely on the Carrier's unilateral change in the prior practice on this property which practice is, in our judgment, a binding condition of employment equally a part of the parties' collective bargaining agreement although not specifically expressed therein. Yet, in view of the extensive and well-reasoned arguments advanced by both the Organization and the Carrier, this Board feels obliged to address those arguments.

This Board agrees with the Carrier that the Organization's reliance on the Fourth Amendment's prohibition against unreasonable searches and seizures is clearly misplaced. The Fourth Amendment proscribes unreasonable searches and seizures conducted by governmental entities. It does not govern the conduct between a railroad and its employees. Accordingly, even were it shown that the Intoxilyzer program involved in this dispute constitutes an unreasonable search and seizure, nevertheless its implementation was certainly not barred by the Fourth Amendment to the United States Constitution.

The Organization's claim that the Intoxilyzer program violates the California Constitution poses a more vexing legal question, however. Article I, Section 1, of the California Constitution was amended in 1972. It provides as follows:

> "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, *and privacy*" (Emphasis added).

Unlike the Fourth Amendment to the United States Constitution, the right of privacy granted by the California Constitution is not limited to state action. Rather, it

constitutes an inalienable right which may not be violated by *anyone*. This, quite naturally, imposes legal restraints on business as well as government activity. Thus, it appears to this Board that the Carrier is proscribed from denying any of its employees who reside in the State of California the inalienable rights guaranteed them by Article I, Section 1 of the California Constitution, including the right to privacy.

While the legal parameters of this constitutional right to privacy have not yet been resolved, the California Supreme Court has had two occasions to consider this constitutional right. Although the facts involved in both these decisions were quite dissimilar from the facts which gave rise to this dispute, nonetheless those decisions are instructive insofar as the right to privacy is a factor in this dispute.

In *White v. Davis,* 13 C.3d 757, a dispute involving the use of police undercover agents to monitor class discussions at a state university, the California Supreme Court explained the genesis of the privacy provision added to the State Constitution in 1972. The Court declared, in pertinent part, as follows:

> ". . . the moving force behind the new constitutional provision was a more focussed privacy concern, relating to the accelerating encroachment on personal freedom and security caused by increased surveillance and data collection activity in contemporary society. The new provision's primary purpose is to afford individuals some measure of protection against this modern threat to personal privacy. . . . Several important points emerge from this election brochure 'argument,' a statement which represents, in essence, the only 'legislative history' of the constitutional amendment available to us. First, the statement identifies principal mischiefs at which the

amendment is directed; . . . (2) the overbroad collection and retention of unnecessary personal information by government and business interests; (3) the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party; . . . second, the statement makes clear that the amendment does not purport to prohibit all incursion into individual privacy but rather that any such intervention must be justified by a compelling interest. Third, the statement indicates that the amendment is intended to be self-executing, i.e., that the constitutional provision, in itself, 'creates a legal and enforceable right to privacy for every Californian.' "

In *Porten v. University of San Francisco* 64 C.A.3d 825, the plaintiff sought damages against the University account of the University's claimed misconduct in disclosing to the State Scholarship and Loan Commission the grades plaintiff had earned in an out-of-state university before transferring to this University. The California Supreme Court reiterated the decision rendered in *White v. Davis* that the constitutional provision is self-executing; hence, it confers a judicial right of action on all Californians. It is obvious that in California one's privacy is protected not merely against state action; it is considered an inalienable right which may not be violated by anyone. The California Supreme Court in both *Porten* and *White* gave the privacy provision added to the State Constitution in 1972 a broad application.

Although the California Supreme Court stated that "the full contours of the new constitutional provision have not as yet even tentatively been sketched" (*White v. Davis* at page 773) nevertheless, in our view, the Organization in this proceeding has at least arguable [arguably] established a prima facie violation of the

California Constitution. Whether the California Supreme Court agrees with our conclusions; or whether it believes there exists a "compelling public interest" which justified implementation of Carrier's Intoxilyzer program are, quite naturally, questions that must ultimately be resolved by that Court. However, we have, parenthetically of course, expressed our views respecting the California Constitution inasmuch as this subject was joined in the proceeding before this Board.

While it is certainly not the province of this Board to suggest a mutually acceptable program for detecting the use of alcohol by Engineers on Carrier's property, it does appear that the Intoxilyzer program as implemented by the Carrier in September, 1980 [is] flawed in several material respects.

For instance, as observed heretofore in these *Findings*, the program is applied randomly and is administered indiscriminately to all employees regardless of whether the Carrier has reason to suspect them of violating Rule G. Since *any* registration on the machine will result in an employee not being allowed to assume duty, the program obviously interferes with the privacy of employees. Since consumption of but one alcoholic beverage would result in registration on the machine, the Carrier's program obviously imposes restrictions on employees' personal lives.

Additionally, the program as currently administered ignores statutory definitions of "under the influence." The vast majority of state statutes require law enforcement personnel to have probable cause to suspect that one is under the influence of alcohol before they are granted the right to require a compulsory alcohol test. Moreover, again in the vast majority of states, a reading of less than .05 percent alcohol creates a presumption that one is not intoxicated, unlike the Carrier's program which creates no such presumption.

Whether a collaborative program of enforcement and rehabilitation is preferrable to a punitive program is, of course, a question beyond the competence and authority of this Board. That less intrusive alcohol detection programs exist is quite clear, however. For instance, the airline industry has an extensive alcohol abuse program applicable to its pilots, which program is significantly less intrusive than Carrier's Intoxilyzer program.

This Board will not attempt to suggest an alcohol detection program that would address the concerns of both the employees and the Carrier. This would obviously be contrary to the jurisdiction we possess. All we have decided in this dispute is that the Intoxilyzer program unilaterally implemented by the Company in September, 1980 was contrary to the prior long-standing practice that existed on this property for detecting intoxication. Since that practice constituted a binding condition of employment which was just as much a part of the collective bargaining agreement between the parties as the written terms thereof, the Carrier had no right to unilaterally abrogate this prior practice. Clearly, any rights reserved to the Carrier under the contract to operate its business were restricted by this condition of employment.

Finally, this Board clearly recognizes the high degree of responsibility placed on the Carrier to assure the public and its employees that its business is operated safely. It is noteworthy, however, that even the National Transportation Safety Board, an agency that submitted several recommendations to the Carrier on how to improve its safety, never recommended that Carrier institute an Intoxilyzer program. Even the nation's airline industry, whose obligation to the public and to its employee's [sic] equals that imposed on the Carrier, has not required its pilots to prove their sobriety as a condition for assuming or remaining on duty.

In conclusion, it is the considered opinion of this Board that the Intoxilyzer program instituted by the Carrier in September, 1980, violated the collective bargaining agreement between the Carrier and the Organization. The Carrier is, accordingly, ordered to rescind this program forthwith.

AWARD: The Carrier violated the collective bargaining agreement with the Organization when it instituted its Intoxilyzer program in September, 1980. The Carrier is, accordingly, ordered to rescind this program forthwith.

DATED AT CHICAGO, ILLINOIS,
THIS 25th DAY OF June 1982

NATIONAL RAILROAD ADJUSTMENT BOARD
BY ORDER OF FIRST DIVISION

ATTEST:

/s/ Nancy J. xxxxx [sic]
Nancy J. xxxxx [sic]
Acting Executive Secretary

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*	:	CIVIL ACTION
vs.	:	FILED APRIL 28, 1987
CONSOLIDATED RAIL CORPORATION	:	NO. 86-2698

ORDER

AND NOW, this 27th day of April, 1987, upon consideration of the parties' cross-motions for summary judgment, it is hereby ORDERED that plaintiffs' complaint is DISMISSED for lack of subject matter jurisdiction. My decision is based on the following:

1. Plaintiffs Railway Labor Executives' Association, *et al.* seek to enjoin defendant Consolidated Rail Corporation (Conrail) from requiring employees represented by plaintiffs to undergo alcohol and drug testing. Plaintiffs claim Conrail's unilateral imposition of drug testing is contrary to the requirements of the Railway Labor Act, ("RLA") 45 U.S.C. §§151-188, and violates the Fourth Amendment of the United States Constitution.

2. Defendant argues that drug testing during return-to-work and periodic physical examinations involves a "minor dispute" under the RLA, and is subject to the mandatory and exclusive jurisdiction of the National Railroad Adjustment Board or a public law board. *See* 45 U.S.C. §153.

3. Plaintiffs, however, maintain that their claim is a "major dispute" subject to federal injunctive relief until the parties resolve the question in a collective bargaining agreement.

4. A major dispute arises when the contested conduct is not based on a collective bargaining agreement or on the long-standing practices or recognized customs of the parties. *See Elgin, Joliet & Eastern R.R. Co. v. Burley*, 325 U.S. 711, 723-24 (1945); *Brotherhood of Maintenance v. Burlington Northern R.R. Co.*, 802 F.2d 1016, 1022 (8th Cir. 1986). *See also International Ass'n of Machinists v. Northwest Airlines*, 673 F.2d 700, 705-06 (3d Cir. 1982).

5. A minor dispute relates to the meaning or proper application of a particular provision of an existing agreement or long-standing practice. *See Brotherhood of Maintenance*, 802 F.2d at 1022.

6. A dispute is minor if the parties' agreement is reasonably susceptible of the contested interpretation or if the employer's action is arguably justified under the terms of the existing agreement. *Id.* Thus, the employer bears a "relatively light" burden of showing that its action is a minor change. *Id.*

7. Since its inception in 1976, Conrail has required all hourly employees to undergo periodic and return-to-duty physical examinations. These physicals have included urinalysis, but not a drug screen. *See* Stipulation ¶ 5, 6.

8. Under some circumstances, involving suspected drug use or prior drug problems however, Conrail has included a drug screen as part of a physical examination urinalysis. *See id.* ¶ 7.

9. Since February, 1987, Conrail has included a drug screen as part of all periodic and return-to-work physicals.

10. Therefore, Conrail's decision to expand its use of drug testing is arguably justified under terms of the parties' long-standing medical policy. The

union and Conrail always have shared a concern over drug and alcohol abuse, *see* Rule G, Stipulation ¶ 1, and since 1976 they have acquiesced in certain procedures to ensure an employee's fitness for the job. The parties always have recognized Conrail's right to remove from service employees who are unable to perform their duties safely. Conrail's drug testing program is a further refinement of that practice and is consistent with its right to ensure the safety of its operations.

11. Under these circumstances, Conrail's action constitutes a minor dispute, and for the reasons set forth in *Brotherhood of Maintenance*, 802 F.2d 1016; *Railway Labor Executives' Ass'n, et al. v. Southern Ry. Co.*, C.A. No. C86-1570 (N.D. Ga., Mar. 4, 1987); *Railway Labor Executives' Ass'n, et al. v. Norfolk & Western Ry. Co.*, C.A. No. 86-C-2064 (N.D. Ill., Feb. 2, 1987), I dismiss Counts I and II for lack of subject matter jurisdiction.

12. Although I could grant an injunction even in a minor dispute, this authority must be exercised only in rare cases where it is necessary to keep the controversy from growing into a major dispute. *See Brotherhood of Maintenance*, 802 F.2d at 1021-22. Plaintiffs have failed to show for purposes of this motion that this is a case calling for such exceptional relief.

13. Finally, I dismiss Count III (alleging a Fourth Amendment violation) because plaintiffs have failed to show for purposes of this motion that Conrail is a federal actor whose actions are subject to constitutional scrutiny. They claim that Conrail is a governmental enterprise because it was created by Congress and it relies heavily on federal funds. These arguments have been uniformly rejected by federal courts and I concur in their analysis. *See*,

e.g., *Morin v. Consolidated Rail Corporation*, 810 F.2d 720, 722-23 (7th Cir. 1987); *Myron v. Consolidated Rail Corp.*, 752 F.2d 50, 54-55 (2d Cir. 1985); *Anderson v. National Railroad Passenger Corp.*, 754 F.2d 202, 204 (7th Cir. 1984); *Wenzer v. Consolidated Rail Corp.*, 464 F. Supp. 643, 647-49 (E.D. Pa.), *aff'd*, 612 F.2d 576 (3d Cir. 1979). Indeed, the Supreme Court has observed that despite federal involvement on the board of directors, Conrail is basically a private enterprise. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 152 (1974).

/s/ A. Scirica
Anthony J. Scirica, J.
April 28, 1987

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 87-1289

RAILWAY LABOR EXECUTIVES' ASSOCIATION; AMERICAN RAILWAY AND AIRWAY SUPERVISORS ASSOCIATION, DIVISION OF BRAC; AMERICAN TRAIN DISPATCHERS ASSOCIATION; BROTHERHOOD OF LOCOMOTIVE ENGINEERS; BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES; BROTHERHOOD OF RAILROAD SIGNALMEN; BROTHERHOOD OF RAILWAY, AIRLINE & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES; BROTHERHOOD OF RAILWAY CARMEN OF THE UNITED STATES AND CANADA; HOTEL EMPLOYEES & RESTAURANT EMPLOYEES INTERNATIONAL UNION; INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS; INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS, AND HELPERS; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS; INTERNATIONAL BROTHERHOOD OF FIREMEN AND OILERS; INTERNATIONAL LONGSHOREMEN'S ASSOCIATION; NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION; SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA; SHEET METAL WORKERS INTERNATIONAL ASSOCIATION; TRANSPORT WORKERS UNION OF AMERICA; UNITED TRANSPORTATION UNION,

Appellants

v.

CONSOLIDATED RAIL CORPORATION

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. Civil No. 86-2698)

Argued November 3, 1987

Before: SLOVITER and BECKER, *Circuit Judges*, and COWEN, *District Judge**

(Opinion filed April 25, 1988)

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*Hon. Robert E. Cowen, United States District Court for the District of New Jersey, sitting by designation. Since the argument of this appeal, Judge Cowen has become a member of this Court.

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OPINION OF THE COURT

SLOVITER, *Circuit Judge*.

The issue presented by the Unions' appeal is whether the railroad's unilateral addition of a drug-screening component to its employees' medical examinations gives rise to a "minor" dispute under the Railway Labor Act over which the district court had no subject matter jurisdiction or to a "major" dispute which would entitle the parties to an injunction maintaining the status quo while they bargain over the change. This case concerns only the process pursuant to which drug screening may be introduced; it has nothing to do with whether drug screening is a good idea.

The district court concluded that the parties' prior practice with respect to medical examinations "arguably justified" the railroad's unilateral imposition of uniform drug screening and dismissed the Unions' action for want of jurisdiction. We will reverse.

I.

Background

A.

Facts

Plaintiffs, the Railway Labor Executives' Association, whose members head railway labor unions representing all crafts, and eighteen unions representing those crafts (hereinafter "Unions"), and defendant Consolidated Rail Corporation ("Conrail"), a railroad, have stipulated to the essential facts in this case. Since its formation in 1976, Conrail has required all employees to

undergo periodic physical examination at intervals varying between one and three years depending on the employee's age and job classification, and has required an examination upon the return to duty of all employees operating trains and engines who were out of service thirty days or longer and of all other employees out of service ninety days or longer "due to furlough, leave, suspension or similar causes." App. at 71. These examinations have routinely included urinalysis for blood sugar and albumin.

Conrail employees always have been subject to Rule G or its equivalent, an industry-wide rule, which prohibits the use or possession of "intoxicants, narcotics, amphetamines or hallucinogens" by employees on duty or the use of such substances by employees subject to duty, and which requires employees under medication to be certain that their safe performance of duty is not compromised. This rule has been enforced in the past principally by supervisory observation.

Conrail has routinely used drug screening urinalysis as part of the return-to-duty medical examination of any employee previously taken out of service because of a drug-related problem, and in both periodic and return-to-duty examinations, when the examining physician suspected drug abuse. In applying Rule G, Conrail "encourag[ed] employees who are suspected of being drug or alcohol abusers to voluntarily agree to undergo blood, urine, or other diagnostic tests." *See* App. at 70; *cf. Brotherhood of Locomotive Eng'rs v. Burlington Northern R.R. Co.*, 838 F.2d 1087, 1089 (9th Cir. 1988) (railroad's employee suspected of drug use could avoid suspicion by voluntarily submitting to urinalysis); *Brotherhood of Maintenance of Way Employees v. Burlington Northern R. R. Co.*, 802 F.2d 1016, 1018 (8th Cir. 1986) (Arnold, J., for a unanimous court, concurring in part) (same).

In February 1986, the regulations of the Federal Railway Administration on "Control of Alcohol and Drug

Use in Railroad Operations" became effective. 49 C.F.R. §219 (1987). These regulations require post-accident drug screening by urinalysis, breathalizer and/or blood testing for all employees covered by the Hours of Service Act, 45 U.S.C. §61-66 (1982), *i.e.*, for operating employees.[1] Employees reasonably suspected of being under the influence of a prohibited substance may also be tested if they are involved in an operating rule violation or contribute to an accident. The application of these regulations to covered employees is not at issue on this appeal.

On February 20, 1987, Conrail announced its unilateral decision to include a drug screen as part of the urinalysis in all periodic and return-to-duty examinations, and in any special examinations deemed necessary by the physician after a return from a drug-related absence from duty. The Unions filed suit in district court alleging that Conrail's action violated Section 6 of the Railway Labor Act, 45 U.S.C. §156 (1982), and the Fourth Amendment's prohibition of unreasonable search and seizure and sought to enjoin Conrail from instituting the drug testing.

All parties moved for summary judgment. The district court, based on the facts set forth above, concluded that "Conrail's decision to expand its use of drug testing is arguably justified under terms of the parties' long-standing medical policy." *See Railway Labor Executives' Ass'n v. Conrail*, No. 86-2698, slip op. at 3 (E.D. Pa. April 28, 1987). It therefore found the dispute to be a "minor" one and dismissed the counts of the complaint

1. The Hours of Service Act applies to any "individual actually engaged in or connected with the movement of any train," but not to all railroad employees. 45 U.S.C. §61(b)(2). The Court of Appeals for the Ninth Circuit has recently held the Federal Railway Administration regulations to be unconstitutional under the Fourth Amendment. *See* Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575 (9th Cir. 1988). That issue is not before us.

based on the Railway Labor Act. The court also dismissed the Fourth Amendment claim on the ground that Conrail is not a government enterprise. *Id.* at 3-4. The Unions appeal only the order dismissing the Railway Labor Act counts.

The district court's conclusion that the drug-testing program constitutes a minor dispute is a legal determination. *Brotherhood of Locomotive Eng'rs v. Burlington Northern R.R. Co.*, 838 F.2d at 1089; *see Goclowski v. Penn Central Transp. Co.*, 571 F.2d 747, 755 (3d Cir. 1977); *United Transp. Union v. Penn Central Transp. Co.*, 505 F.2d 542, 543-45 (3d Cir. 1974). *But see Railway Labor Executives' Ass'n v. Norfolk and Western Ry. Co.*, 833 F.2d 700, 707 (7th Cir. 1987). Because the district court dismissed the claims pursuant to the undisputed facts, its order, akin to a grant of summary judgment, is subject to plenary review. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir. 1976), *cert. denied*, 429 U.S. 1038 (1977); *cf. Medical Fund-Philadelphia Geriatric Center v. Heckler*, 804 F.2d 33, 36 (3d Cir. 1986) ("dismissal of a complaint for lack of jurisdiction . . . raises a question of law subject to plenary review").

B.

Major and Minor Disputes

This court has recently had occasion to review the statutory background of the Railway Labor Act in *Railway Labor Executives' Association v. Pittsburgh & Lake Erie Railroad Co.*, No. 87-3797 (3d Cir. April 8, 1988). Therfore, we will only briefly discuss the provisions relating to major and minor disputes insofar as necessary to an understanding of the issue before us.

The Railway Labor Act ("RLA"), 45 U.S.C. §151 *et seq.*, was passed in 1926 to facilitate labor peace in the railroad industry, then the backbone of the American transportation system. *See* H.R. Rep. No. 328, 69th Cong., 1st Sess. 1-3 (1926) [hereinafter *1926 House*

Report]; *Baker v. United Transp. Union*, 455 F.2d 149, 153-54 (3d Cir. 1971). In an unprecedented cooperative process, the Act was drafted by negotiators for railroad management and labor and presented to Congress as, esscntially, a finished product. *See 1926 House Report* at 1, 3. In its original form, the Act did not provide compulsory arbitration for any claim; it worked instead to prevent strikes and lockouts by funneling disputes into "purposely long and drawn out [procedures], based on the hope that reason and practical considerations will provide in time an agreement that resolves the dispute." *Brotherhood of Ry. & S.S. Clerks v. Florida East Coast Ry. Co.*, 384 U.S. 238, 246 (1966); *see Elgin, Joliet & Eastern R.R. v. Burley*, 325 U.S. 711, 725-27 (1945).

From the beginning, the Act made a distinction between disputes arising from grievances and the interpretation of a contract ("minor" disputes), on the one hand, and disputes arising from changes in pay rates, work rules and working conditions ("major" disputes), on the other. *See* Railway Labor Act, Pub. L. No. 257, §§3, First, 5(a)-(b), 6, 44 Stat. 577, 578-82 (1926); *see also Brotherhood of R.R. Trainmen v. Chicago R. & I. R.R. Co.*, 353 U.S. 30, 35 (1957). Originally, minor disputes could be submitted to binding arbitration by "adjustment boards" composed of equal representatives of labor and management voluntarily established by the parties. The inability of the parties to agree to such boards and the deadlock in thousands of disputes before boards led Congress to amend the Act in 1934 to create the National Railroad Adjustment Board before which either side in a minor dispute can submit the issue to compulsory arbitration if the parties have not agreed on their own arbitrators. Railway Labor Act, ch. 691, §23, 48 Stat. 1185, 1189-93 (1934); *Trainmen*, 353 U.S. at 39; *Elgin*, 325 U.S. at 726. *See generally* Garrison, *The National Railroad Adjustment Board: A Unique Administrative Agency*, 46 Yale L.J. 567, 574-76 (1937). The carrier is not barred in minor disputes from introducing

the disputed change during the pendency of the arbitration proceedings. *See* 45 U.S.C. §153; *Goclowski v. Penn Central Transp. Co.*, 571 F.2d 747, 754 n.6 (3d Cir. 1977); *cf.* 45 U.S.C. §156.

In contrast, parties to a major dispute have always been required to proceed through a more extensive mediation and conciliation mechanism as specified by sections 5 and 6 of the Act. 45 U.S.C. §§155-56; *see 1926 House Report* at 3-5; *Elgin*, 325 U.S. at 725-26. During this process, the parties are entitled to an injunction, if necessary, to preserve the status quo. *United Transp. Union v. Penn Central Transp. Co.*, 505 F.2d 542, 543 (3d Cir. 1974) (per curiam).[2]

The legislative history makes clear that labor's acquiescence to the RLA's procedure, including management's right to introduce changes in "minor" dispute situations, was dependent on the general understanding that "minor" disputes, with their attendant compulsory arbitration, were to be limited to "comparatively minor" problems, "represent[ing] specific maladjustments of a detailed or individual quality," *Elgin*, 325 U.S. at 724, in contrast to the "large issues about which strikes ordinarily arise," *id.* at 723-24. *See Trainmen*, 353 U.S. at 39 (general understanding was that compulsory arbitration covered only a "limited field"). *See generally* Garrison, *supra*, at 586-91 (describing typical minor disputes).

The classic explanation of the distinction between major and minor disputes appears in *Elgin*. Major disputes are said to arise "where there is no [collective

2. There are four, narrowly-cabined situations in which a district court may have subject-matter jurisdiction in a minor dispute despite non-exhaustion of the arbitration procedures. Childs v. Pennsylvania Fed. Bhd. of Maintenance of Way Employees, 831 F.2d 429, 437-38 (3d Cir. 1987). One of them, applicable "when resort to administrative remedies would be futile," Sisco v. Conrail, 732 F.2d 1188, 1190 (3d Cir. 1984), has been raised by the Unions here. Because of our disposition of the case, we do not reach this question.

bargaining] agreement or where it is sought to change the terms of one. . . . They look to the acquisition of rights for the future, not the assertion of rights claimed to have vested in the past." 325 U.S. at 723. Minor disputes arise where an existing agreement is being applied, "a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case." *Id.*; *accord Trainmen*, 353 U.S. at 33 ("These are controversies over the meaning of an existing collective bargaining agreement, generally involving only one employee.")

We have adopted the following test to assist in determining whether the dispute is a minor one:

> [I]f the disputed action of one of the parties can "arguably" be justified by the existing agreement or, in somewhat different statement, if the contention that the labor contract sanctions the disputed action is not "obviously insubstantial", the controversy is [a minor dispute] within the exclusive province of the National Railroad Adjustment Board.

Local 1477 United Transp. Union v. Baker, 482 F.2d 228, 230 (6th Cir. 1973), *quoted in United Transp. Union v. Penn Central*, 505 F.2d at 544; *accord, e.g., Brotherhood of Locomotive Eng'rs v. Burlington Northern R.R. Co.*, 838 F.2d 1087, 1091 (9th Cir. 1988). For this purpose, it is not necessary that the terms of a collective bargaining agreement governing relations under the Act be embodied in a written document; instead they may be inferred from habit and custom. *See Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142 (1969); *Brotherhood of Locomotive Eng'rs v. Burlington Northern*, 838 F.2d at 1091-92; *Brotherhood of Maintenance of Way Employees v. Burlington Northern R.R. Co.*, 802 F.2d 1016, 1022 (8th Cir. 1986) (Arnold J., for a unanimous court, concurring).

In this case, the district court found, and the parties do not dispute, that Rule G and the medical examination policy, although not incorporated in the parties' written agreement, constitute implied-in-fact contractual terms. Thus, we reach the principal issue: whether Conrail's imposition of a drug screen was an interpretation of one or both of these agreements thereby constituting it as a minor dispute under 45 U.S.C. §153, First, (i), which it could institute unilaterally, or whether its attempt to impose such a drug screen was a new term constituting a major dispute under 45 U.S.C. §152, Seventh, over which it must bargain.

III.

Discussion

The Unions argue that the incorporation of a drug-screen test as an element of the urinalysis required in all periodic and return-to-duty physical examinations is a change in the existing rules and working conditions. They argue that the working conditions had not previously encompassed testing employees for drugs without some particularized suspicion or past medical problem and therefore the across-the-board testing is a major dispute within the jurisdiction of the district court. They also argue that the drug-screen represents a new method of enforcing Rule G, which had been enforced primarily by supervisory observation. Such a unilateral change in the method of enforcement, they contend, constitutes a major dispute.

Conrail responds that the addition of drug screening is arguably justified by the parties' long-standing implied-in-fact agreement authorizing Conrail to test the urine of employees to identify workers who are medically unfit for duty. It claims that the new screening is within its prerogative to modify its medical standards and procedures as a result of advances in medical science and medical technology. Conrail contends that because

there was no practice of requiring some medical evidence of drug usage prior to urinalysis as part of its routine medical examination, its new program which adds the drug-screen component to such urinalysis is not a significant departure from past practice.

A.

Three other courts of appeals have considered the same or similar drug-testing issues under the RLA, with varying results and rationales. In a pair of cases, the Ninth Circuit denominated as major disputes the use of drug-detecting dogs, *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co.*, 838 F.2d 1102 (9th Cir. 1988) *(Dog Search Case)*, and mandatory urinalysis testing of crewpeople implicated in "human-factor" accidents or operating-rule violations, *Brotherhood of Locomotive Engineers v. Burlington Northern Railroad Co.*, 838 F.2d 1087 (9th Cir. 1988) *(Chemical Testing Case)*, as a means of enforcing Rule G.

The majority's decision in the *Chemical Testing Case* was based chiefly on the "critical differences between the old method and the new method: the old method of enforcing Rule G was voluntary, and required particularized suspicion; the new method is mandatory, and requires only generalized suspicion." *Id.* at 1092. It noted that the enforcement method employed in the past — the supervisor's "observing an employee's gait, breath, odor, slurred speech, or bloodshot eyes — was non-intrusive." *Id.* It rejected the railroad's claim that the union, by acquiescing "in Rule G's enforcement by sensory surveillance can be said to have agreed to allow [the railroad] to implement *any* procedure beyond sensory surveillance so long as the procedure is brought into play by . . . an 'objective triggering event.' " *Id.* The court also noted that it had recently held that the Fourth Amendment was violated by Federal Railway Administration regulations which imposed a similar testing

program based only on generalized suspicion arising from an accident. *Id.* at 1093 (citing *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir. 1988)). The court ruled that it would construe the implied agreement with the railroad in enforcing Rule G as containing the same expectation of privacy as to the employer as the worker had as to the government. *Id.* at 1093. Because the new mandatory urine testing program changed the working conditions governed by the bargaining agreement, it was "by definition" a major dispute. *Id.*

In the *Dog Search Case*, involving the use of trained dogs to randomly search for drugs, the court again relied on the fact that previous practice under Rule G had always required "a triggering event", the perception of facts by an official suggesting that a specific employee was under the influence of alcohol or drugs. 838 F.2d at 1105. Furthermore, the court construed the parties' implied agreement as directed to whether an employee was under the influence of a prohibited substance, unlike the newly imposed search which was directed to detecting possession to prevent future use. *Id.*

Railway Labor Executives Association v. Norfolk & Western Railway Co., 833 F.2d 700 (7th Cir. 1987), presented the Seventh Circuit with issues almost identical to those we confront here. As here, the railroad added a drug screen to the urinalysis that had been a routine element of the medical examination. Rejecting the unions' argument that the drug-screening intruded into employees' conduct outside of the workplace, the court held that "[t]he addition of a drug screen as a second component of the urinalysis previously required of all employees does not constitute such a drastic change in the nature of the employees' routine medical examination or the parties' past practices that it cannot arguably be justified by reference to the parties' agreement." *Id.* at 706. The court of appeals rejected the unions' argument that the testing was designed to

enforce Rule G, holding that the district court's factual finding "that [the railroad] had not made any unilateral changes in the enforcement of Rule G" was not clearly erroneous. *Id.* at 707.

There were two separate testing issues before the Eighth Circuit in *Brotherhood of Maintenance of Way Employees v. Burlington Northern Railroad Co.*, 802 F.2d 1016 (8th Cir. 1986). One, which is not at issue here, concerned the railroad's institution of post-incident testing to enforce Rule G. The court unanimously concluded that although the ground rules between the parties governing Rule G enforcement required suspicion of impairment to justify a test, the urinalysis " 'of the individual crew member having . . . exclusive responsibility for the action triggering the incident' " or other crew members "only when individual responsibility is not clear" satisfied that suspicion requirement and would not be "such a serious departure from past practice as to give rise to a major dispute." *Id.* at 1023 (quoting railroad policy).

The court divided on the second issue, the railroad's institution of a drug screen as part of its periodic and return-to-duty medical exams. Two members of the court tersely reversed the district court's finding that the medical examination screening presented a major dispute. The majority noted that the union did not deny that the agreement allowed medical testing to identify workers who were unfit for duty, and stated that consequently, "all that is involved in the parties' dispute is the extent to which the urinalysis component of these examinations may be refined in order to predict safe employee performance." *Id.* at 1024; *see also International Ass'n of Machinists, District Lodge 19 v. Southern Pacific Transp. Co.*, 105 LRRM 2046 (E.D. Cal. 1980) (use of alcohol breath test a minor dispute). Judge Arnold, in dissent, stressed that regardless of whether the testing was characterized as a medical or disciplinary matter, the medical testing program could result in

an employee's being fired without any prior suspicion of drug use. 802 F.2d at 1025 (Arnold, J., dissenting in part). "This new examination is universal and indiscriminate, in the sense that it is imposed without regard to any degree of suspicion that the employee is working while impaired." *Id.* at 1024. Such a change, he argued, was too significant to go forward without negotiations between the parties.

B.

The absence of any uniformity in interpretation by the other courts reinforces our responsibility to make an independent analysis of the applicable law to the undisputed facts. When a court holds that an existing agreement, explicit or implied, arguably justifies a new practice, the court has determined that it is plausible to believe that there was in fact a meeting of the parties' minds on the general issue. In this case, we must determine whether the existing agreement arguably admits of an implied term encompassing the new drug screening. *See Chemical Testing Case*, 838 F.2d at 1092-93; *cf. Transportation-Communication Employees Union v. Union Pacific R.R. Co.*, 385 U.S. 157, 160-61 (1966) ("In order to interpret [a collective bargaining] agreement it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements.")

The district court held that the new testing was arguably within the terms of the existing medical examination agreement. We reach a contrary legal conclusion because the undisputed terms of the implied agreement governing medical examinations cannot be plausibly interpreted to justify the new testing program.

Under the stipulation agreed to by the parties, use of a drug screen was included as part of the urinalysis in

return-to-duty physical examinations "when the employee has been previously taken out of service for a drug-related problem, or when, in the judgment of the examining physician, the employee may have been using drugs." App. at 71. It was included as part of the periodic physical examination only in the latter situation, "when, in the judgment of the examining physician, the employee may have been using drugs." App. at 71-72.

Conrail argues that because it has been conducting drug-screen urinalysis from time to time since 1976, there is an arguable contractual basis for its imposition of drug screening as part of its routine medical examinations.[3] This argument overlooks what to us is the determinative distinction between the old and new practice: before, drug screening was included only when there was particularized cause and not as part of the routine urinalysis. The fact that the prior agreement encompassed drug screening only in instances where there was cause and limited the routinely administered urinalysis to tests for blood sugar and albumin persuades us to reject Conrail's argument that the medical testing agreement justifies testing without cause.

If we were to accept Conrail's argument that its prior medical testing justified the drug screen, it would expand the scope and effect of medical testing beyond that

3. In 1984, Conrail issued a new medical standards manual requiring a drug screen to be carried out in connection with all periodic examination urinalyses. The mandated testing was performed in only one of its four administrative regions, and was discontinued for budgetary reasons after six months. Conrail does not contend that this period of limited uniform testing without the apparent knowledge or agreement of the Unions worked a change in the parties' general agreement governing medical testing. *See generally* Baker v. United Transp. Union, 455 F.2d 149, 156 (3d Cir. 1971) (practice became part of parties' agreement where "the railroad has engaged in a certain activity over a sufficient period of time for the union to become aware of it and react accordingly if it objects").

of Rule G, the disciplinary rule aimed specifically at substance abuse. Under Rule G, only employees who are impaired while on the job or on call may be disciplined, whereas an employee whose drug use is detected through the new medical testing program may be fired even though s/he was never found to be impaired while at work or subject to duty.

Ultimately, Conrail's argument rests on the premise that testing urine for cannabis metabolites is no different in kind from testing urine for blood sugar. This ignores considerable differences in what is tested for and the consequences thereof. Employee drug testing is a controversial issue throughout the railroad industry and beyond. *See, e.g., Jones v. McKenzie*, 833 F.2d 335 (D.C. Cir. 1987) (school bus attendants); *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987) (Customs Service employees), *cert. granted*, 108 S. Ct. 1072 (1988); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.) (race track jockeys), *cert. denied*, 107 S. Ct. 577 (1986); *Transport Workers' Union of Philadelphia v. Southeastern Pennsylvania Transp. Authority*, 678 F. Supp. 543 (E.D. Pa. 1988) (municipal transport workers); *Association of Western Pulp and Paper Workers v. Boise Cascade Corp.*, 644 F. Supp. 183 (D. Or. 1986) (paper mill workers); *Patchogue-Medford Congress of Teachers v. Board of Education*, 70 N.Y.2d 57, 510, N.E.2d 325, 517 N.Y.S.2d 456 (1987) (school teachers). The practice poses serious ethical and practical dilemmas as well. *See, e.g., Substance Abuse in the Workplace: Readings in the Labor-Management Issues* (R. Hogler ed. 1987) [hereinafter *Substance Abuse*] (collecting commentary). We regard it as particularly significant that the General Counsel of the National Labor Relations Board has taken the position that drug screening, even where it is added to a pre-existing medical examination program, constitutes a substantial change in working conditions and is a mandatory subject of bargaining under the National Labor Relations

Act. *See* National Labor Relations Board, Office of the General Counsel Mem. GC 87-5 (Sept. 8, 1987), *reprinted in* Daily Labor Report (BNA), No. 184 at D-1 (Sept. 24, 1987) ("When conjoined with discipline, up to and including discharge, for refusing to submit to the test or for testing positive, the addition of a drug test substantially changes the nature and fundamental purpose of the existing physical examination.")

The function of bargaining over major disputes is obviously to reach agreement on terms and conditions which have not yet been addressed. Conrail cannot point to any existing agreement between the parties on such crucial matters as the drug test to be used, the methods of confirming positive results, and the confidentiality protections to be employed. *Cf. Shoemaker*, 795 F.2d at 1140, 1144; Rothstein, *Screening Workers for Drugs*, in *Substance Abuse*, *supra*, 115, 116-22. We search the past practices of the parties in vain for any indication of an agreement on these key matters. It follows that the agreement governing prior medical examinations cannot be strained to include, even arguably, an agreement to routinely perform a drug screen.

C.

The Unions also argue that the new testing is a change in working conditions in that it represents a change in the method of enforcing Rule G, which is itself a working condition. Conrail denies that its drug testing is designed to enforce Rule G, but argues that even if it were, the implementation of a new procedure to enforce Rule G would be a minor dispute. As we noted before, the only court of appeals to reach the issue of the characterization for RLA purposes of a change in the method of enforcement of Rule G ruled that it raised a major dispute. *See Chemical Testing Case*, 838 F.2d at 1092-93; *see also Brotherhood of Maintenance of Way Employees v. Burlington Northern R.R. Co.*, 802 F.2d at

1024-25 (Arnold, J., dissenting in part). However, in light of Conrail's disavowal of Rule G as a justification for the newly imposed drug screen and our conclusion that the existing medical policy did not arguably justify the drug screen, we need not reach the Rule G enforcement issue.

IV.

Conclusion

As we have explained above, Conrail's addition of drug screening to the urinalysis examination of employees as to whom Conrail has no particularized suspicion of drug use changes the terms and conditions governing the employment relationships. It therefore constitutes a major dispute which Conrail cannot impose unilaterally. Instead, the RLA requires that the parties must bargain under the prescribed procedure.

In so holding, we do not minimize the serious drug and alcohol problem in the transportation industry. *See, e.g.*, De Rosa, *Alcohol Problems in the Railroad Industry*, in *Substance Abuse*, *supra*, 29, 29 (reporting estimate that some 25 percent of railroad workers drink on duty or while subject to duty); *New Regulations to Control Substance Abuse in the Transportation Industry*, in *id.* at 31 (alcohol and drug abuse responsible for 37 deaths, 80 injuries and $34 million in property damage between 1975 and 1985). We also note that the Unions have stated in their brief that they "yield to no one in abhorence [sic] of alcohol or drug use in employment, or in the desire to purge the industry of their adverse effects." Appellants' Brief at 4. They will have an opportunity to effectuate this desire at the bargaining table.

The order of the district court dismissing the complaint for lack of subject matter jurisdiction will be reversed and the case remanded for further proceedings consistent with this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

STATUTORY PROVISIONS OF THE RAILWAY LABOR ACT

§152. General duties

First. Duty of carriers and employees to settle disputes

It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. Consideration of disputes by representatives

All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

Third. Designation of representatives

Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

Fourth. Organization and collective bargaining; freedom from interference by carrier; assistance in organizing or maintaining organization by carrier forbidden; deduction of dues from wages forbidden

Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

Fifth. Agreements to join or not to join labor organizations forbidden

No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

Sixth. Conference of representatives; time; place; private agreements

In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided*, (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such places of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further*, That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Seventh. Change in pay, rules, or working conditions contrary to agreement or to section 156 bidden

No carrier, its officers or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

Eighth. Notices of manner of settlement of disputes; posting

Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provision of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

Ninth. Disputes as to identity of representatives; designation by Mediation Board; secret elections

If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with

the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

Tenth. Violations; prosecution and penalties

The willful failure or refusal of any carrier, its officers or agents to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000 nor more than $20,000 or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply to institute in the proper

court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

Eleventh. Union security agreements; check-off

Notwithstanding any other provisions of this chapter, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this chapter and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this chapter shall be permitted—

(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided*, That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation

fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.

(b) to make agreements providing for the deduction by such carrier or carriers from the wages of its or their employees in a craft or class and payment to the labor organization representing the craft or class of such employees, of any periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership: *Provided*, That no such agreement shall be effective with respect to any individual employee until he shall have furnished the employer with a written assignment to the labor organization of such membership dues, initiation fees, and assessments, which shall be revocable in writing after the expiration of one year or upon the termination date of the applicable collective agreement, whichever occurs sooner.

(c) The requirement of membership in a labor organization in an agreement made pursuant to subparagraph (a) of this paragraph shall be satisfied, as to both a present or future employee in engine, train, yard, or hostling service, that is, an employee engaged in any of the services or capacities covered in the First division of paragraph (h) of section 153 of this title defining the jurisdictional scope of the First Division of the National Railroad Adjustment Board, if said employee shall hold or acquire membership in any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services; and no agreement made pursuant to subparagraph (b) of this paragraph shall provide for deductions from his wages for periodic dues, initiation fees, or assessments payable to any labor organization other than

that in which he holds membership: *Provided, however*, That as to an employee in any of said services on a particular carrier at the effective date of any such agreement on a carrier, who is not a member of any one of the labor organizations, national in scope, organized in accordance with this chapter and admitting to membership employees of a craft or class in any of said services, such employee, as a condition of continuing his employment, may be required to become a member of the organization representing the craft in which he is employed on the effective date of the first agreement applicable to him: *Provided, further*, That nothing herein or in any such agreement or agreements shall prevent an employee from changing membership from one organization to another organization admitting to membership employees of a craft or class in any of said services.

(d) Any provisions in paragraphs Fourth and Fifth of this section in conflict herewith are to the extent of such conflict amended.

§153. National Railroad Adjustment Board

First. Establishment; composition; powers and duties; divisions; hearings and awards; judicial review

There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-four members, seventeen of whom shall be selected by the carriers and seventeen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of sections 151a and 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees or through an officer or officers designated for that purpose by such board, trustee or trustees or receiver or receivers, shall prescribe the rules under which its representatives shall be selected and shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one voting representative on any division of the Board.

(c) Except as provided in the second paragraph of subsection (h) of this section, the national labor organizations, as defined in paragraph (a) of this section, acting each through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one voting representative on any division of the Board.

(d) In case of a permanent or temporary vacancy on the Adjustment Board, the vacancy shall be filled by selection in the same manner as in the original selection.

(e) If either the carriers or the labor organizations of the employees fail to select and designate representatives to the Adjustment Board, as provided in paragraphs (b) and (c) of this section, respectively, within sixty days after June 21, 1934, in case of any original appointment to office of a member of the Adjustment Board, or in case of a vacancy in any such office within thirty days after

such vacancy occurs, the Mediation Board shall thereupon directly make the appointment and shall select an individual associated in interest with the carriers or the group of labor organizations of employees, whichever he is to represent.

(f) In the event a dispute arises as to the right of any national labor organization to participate as per paragraph (c) of this section in the selection and designation of the labor members of the Adjustment Board, the Secretary of Labor shall investigate the claim of such labor organization to participate, and if such claim in the judgment of the Secretary of Labor has merit, the Secretary shall notify the Mediation Board accordingly, and within ten days after receipt of such advice the Mediation Board shall request those national labor organizations duly qualified as per paragraph (c) of this section to participate in the selection and designation of the labor members of the Adjustment Board to select a representative. Such representative, together with a representative likewise designated by the claimant, and a third or neutral party designated by the Mediation Board, constituting a board of three, shall within thirty days after the appointment of the neutral member, investigate the claims of the labor organization desiring participation and decide whether or not it was organized in accordance with sections 151a and 152 of this title and is otherwise properly qualified to participate in the selection of the labor members of the Adjustment Board, and the findings of such boards of three shall be final and binding.

(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section

shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party.

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of eight members, four of whom shall be selected and designated by the carriers and four of whom shall be selected and designated by the labor organizations, national in scope and organized in accordance with sections 151a and 152 of this title and which represent employees in engine, train, yard, or hostling service: *Provided, however,* That each labor organization shall select and designate two members on the First Division and that no labor organization shall have more than one vote in any proceedings of the First Division or in the adoption of any award with respect to any dispute submitted to the First Division: *Provided further, however,* That the carrier members of the First Division shall cast no more than two votes in any proceedings of the division or in the adoption of any award with respect to any dispute submitted to the First Division.

Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers

and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

(k) Any division of the Adjustment Board shall have authority to empower two or more of its members to conduct hearings and make findings upon disputes, when properly submitted, at any place designated by the division: *Provided, however*, That except as provided in paragraph (h) of this section, final awards as to any such dispute must be made by the entire division as hereinafter provided.

(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as "referee", to sit with the division as a member thereof and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute.

(n) A majority vote of all members of the division of the Adjustment Board eligible to vote shall be competent to make an award with respect to any dispute submitted to it.

(o) In case of an award by any division of the Adjustment Board in favor of petitioner, the division of the Board shall make an order, directed to the carrier, to make the award effective and, if the award includes a requirement for the payment of money, to pay to the employee the sum to which he is entitled under the award on or before day named. In the event any division determines that an award favorable to the petitioner should not be made in any dispute referred to it, the division shall make an order to the petitioner stating such determination.

(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil

suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be conclusive on the parties, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed 'a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board; *Provided, however*, That such order may not be set aside except for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

(q) If any employee or group of employees, or any carrier, is aggrieved by the failure of any division of the Adjustment Board to make an award in a dispute referred to it, or is aggrieved by any of the terms of an award or by the failure of the division to include certain terms in such award, then such employee or group of employees or carrier may file in any United States district court in which a petition under paragraph (p) could be filed, a petition for review of the division's order. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Adjustment Board. The Adjustment Board shall file in the court the record of the proceedings on which it based its action. The court

shall have jurisdiction to affirm the order of the division or to set it aside, in whole or in part, or it may remand the proceeding to the division for such further action as it may direct. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order. The judgment of the court shall be subject to review as provided in sections 1291 and 1254 of Title 28.

(r) All actions at law based upon the provisions of this section shall be begun within two years from the time the cause of action accrues under the award of the division of the Adjustment Board, and not after.

(s) The several divisions of the Adjustment Board shall maintain headquarters in Chicago, Illinois, meet regularly, and continue in session so long as there is pending before the division any matter within its jurisdiction which has been submitted for its consideration and which has not been disposed of.

(t) Whenever practicable, the several divisions or subdivisions of the Adjustment Board shall be supplied with suitable quarters in any Federal building located at its place of meeting.

(u) The Adjustment Board may, subject to the approval of the Mediation Board, employ and fix the

compensations of such assistants as it deems necessary in carrying on its proceedings. The compensation of such employees shall be paid by the Mediation Board.

(v) The Adjustment Board shall meet within forty days after June 21, 1934, and adopt such rules as it deems necessary to control proceedings before the respective divisions and not in conflict with the provisions of this section. Immediately following the meeting of the entire Board and the adoption of such rules, the respective divisions shall meet and organize by the selection of a chairman, a vice chairman, and a secretary. Thereafter each division shall annually designate one of its members to act as chairman and one of its members to act as vice chairman: *Provided, however,* That the chairmanship and vice-chairmanship of any division shall alternate as between the groups, so that both the chairmanship and vice-chairmanship shall be held alternately by a representative of the carriers and a representative of the employees. In case of a vacancy, such vacancy shall be filled for the unexpired term by the selection of a successor from the same group.

(w) Each division of the Adjustment Board shall annually prepare and submit a report of its activities to the Mediation Board, and the substance of such report shall be included in the annual report of the Mediation Board to the Congress of the United States. The reports of each division of the Adjustment Board and the annual report of the Mediation Board shall state in detail all cases heard, all actions taken, the names, salaries, and duties of all agencies, employees, and officers receiving compensation from the United States under the authority of this chapter, and an account of all moneys appropriated by Congress pursuant to the authority

conferred by this chapter and disbursed by such agencies, employees, and officers.

(x) Any division of the Adjustment Board shall have authority, in its discretion, to establish regional adjustment boards to act in its place and stead for such limited period as such division may determine to be necessary. Carrier members of such regional boards shall be designated in keeping with rules devised for this purpose by the carrier members of the Adjustment Board and the labor members shall be designated in keeping with rules devised for this purpose by the labor members of the Adjustment Board. Any such regional board shall, during the time for which it is appointed, have the same authority to conduct hearings, make findings upon disputes and adopt the same procedure as the division of the Adjustment Board appointing it, and its decisions shall be enforceable to the same extent and under the same processes. A neutral person, as referee, shall be appointed for service in connection with any such regional adjustment board in the same circumstances and manner as provided in paragraph (l) of this section, with respect to a division of the Adjustment Board.

Second. System, group, or regional boards: establishment by voluntary agreement; special adjustment boards: establishment, composition, designation of representatives by Mediation Board, neutral member, compensation, quorum, finality and enforcement of awards

Nothing in this section shall be construed to prevent any individual carrier, system, or group of carriers and any class or classes of its or their employees, all acting through their representatives, selected in accordance with the provisions of this chapter, from mutually agreeing to the establishment of system, group, or regional

boards of adjustment for the purpose of adjusting and deciding disputes of the character specified in this section. In the event that either party to such a system, group, or regional board of adjustment is dissatisfied with such arrangement, it may upon ninety days' notice to the other party elect to come under the jurisdiction of the Adjustment Board.

If written request is made upon any individual carrier by the representative of any craft or class of employees of such carrier for the establishment of a special board of adjustment to resolve disputes otherwise referable to the Adjustment Board, or any dispute which has been pending before the Adjustment Board for twelve months from the date the dispute (claim) is received by the Board, or if any carrier makes such a request upon any such representative, the carrier or the representative upon whom such request is made shall join in an agreement establishing such a board within thirty days from the date such request is made. The cases which may be considered by such board shall be defined in the agreement establishing it. Such board shall consist of one person designated by the carrier and one person designated by the representative of the employees. If such carrier or such representative fails to agree upon the establishment of such a board as provided herein, or to exercise its rights to designate a member of the board, the carrier or representative making the request for the establishment of the special board may request the Mediation Board to designate a member of the special board on behalf of the carrier or representative upon whom such request was made. Upon receipt of a request for such designation the Mediation Board shall promptly make such designation and shall select an individual associated in interest with the carrier or representative he is to represent, who, with the member appointed by the carrier or representative requesting the establishment of the special board, shall constitute the board. Each member of the board shall be

compensated by the party he is to represent. The members of the board so designated shall determine all matters not previously agreed upon by the carrier and the representative of the employees with respect to the establishment and jurisdiction of the board. If they are unable to agree such matters shall be determined by a neutral member of the board selected or appointed and compensated in the same manner as is hereinafter provided with respect to situations where the members of the board are unable to agree upon an award. Such neutral member shall cease to be a member of the board when he has determined such matters. If with respect to any dispute or group of disputes the members of the board designated by the carrier and the representative are unable to agree upon an award disposing of the dispute or group of disputes they shall by mutual agreement select a neutral person to be a member of the board for the consideration and disposition of such dispute or group of disputes. In the event the members of the board designated by the parties are unable, within ten days after their failure to agree upon an award, to agree upon the selection of such neutral person, either member of the board may request the Mediation Board to appoint such neutral person and upon receipt of such request the Mediation Board shall promptly make such appointment. The neutral person so selected or appointed shall be compensated and reimbursed for expenses by the Mediation Board. Any two members of the board shall be competent to render an award. Such awards shall be final and binding upon both parties to the dispute and if in favor of the petitioner, shall direct the other party to comply therewith on or before the day named. Compliance with such awards shall be enforcible by proceedings in the United States district courts in the same manner and subject to the same provisions that apply to proceedings for enforcement of compliance with awards of the Adjustment Board.

§156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.